

## FORGED INDORSEMENTS

By FRIEDRICH KESSLER †

### I.

WHILE THE Anglo-American and the Continental legal systems have the same rules with respect to the effects of a forgery of the drawer's signature,<sup>1</sup> there is a striking difference between them in their attitude toward a forged indorsement.<sup>2</sup> Under the Uniform Codes on Bills of Exchange and Checks, which were drafted in Geneva in 1931 and 1932 and have been adopted in most of the civil law countries, a holder acquiring an instrument in good faith and without gross negligence by an uninterrupted series of indorsements has good title even in a case where the instrument

†Lecturer in Law, Yale Law School.

1. *BILLS OF EXCHANGE ACT*, § 53; *NEGOTIABLE INSTRUMENTS LAW*, § 62; *GENEVA BILLS OF EXCHANGE ACT*, art. 7; *GENEVA CHECK ACT*, art. 10. The rule common to both legal systems which makes a drawee who has accepted a bill to which the drawer's signature has been forged liable to a bona fide indorsee and which denies him the recovery of his payment can be found very early in DUFUIS DE LA SERRA, *L'ART DES LETTRES DE CHANGE SUIVANT L'USAGE DES PLUS CÉLÈBRES PLACES DE L'EUROPE* (1693), c. 2, no. 22, 23. See further, 1 GRUENHUT, *WECHSELRECHT* (1897) 162 *et seq.*, 224, n. 1. For the classical presentation of the rule, see *Price v. Neal*, 3 Burr. 1354 (1762); 2 GRUENHUT, *supra*, at 14. Only the protection accorded a purchaser who bought the instrument in reliance on the acceptance is explained by the usual rationalization of the rule, i.e., that the indorsee cannot be supposed to discover a forgery of the drawer's signature if such forgery has escaped the drawee-acceptor who, because of his business relations with the drawer, has a basis for examining the genuineness of the drawer's signature. But the rationalization fails to explain why a bona fide purchaser who procures himself the acceptance or receives payment is also protected. An argument for this extended protection could be found in former days when the drawing of a bill of exchange was accompanied by a letter from the drawer to the drawee advising the latter of the drawing. If the drawee accepted or paid without having received this confirmatory letter, there was some ground for treating him like a drawee who accepted without having sufficient funds of the drawer. But today, when such confirmatory letters are usually no longer employed in inland transactions, the broad application of the *Price v. Neal* rule, which is an outgrowth of a different business practice, is difficult to explain as a matter of policy. For an explanation of *Price v. Neal* on the legalistic level, see Ames, *The Doctrine of Price v. Neal* (1891) 4 HARV. L. REV. 297 at 890; KEENER, *QUASI CONTRACTS* (1893) 154 *et seq.*

2. Hudson and Feller, *The International Unification of Laws concerning Bills of Exchange* (1930) 44 HARV. L. REV. 333.

was lost or stolen and one of the signatures forged.<sup>3</sup> As a corollary to this rule, the drawee is bound only to examine the external regularity of the chain of indorsements and is discharged if he pays in good faith to a holder who can establish his title by an uninterrupted series of indorsements.<sup>4</sup> The Anglo-American law, on the other hand, provides generally that a forged signature in an indorsement is wholly inoperative,<sup>5</sup> although the English Bills of Exchange Act makes an exception to this rule in favor of the drawee-banker in regard to checks and other demand drafts.<sup>6</sup>

The Geneva conventions have made a clear-cut distinction between the Continental and Anglo-American rule. But in the early European history of these legal systems, there was no disagreement on the effect of a forged indorsement. It was only with the change of the Continental attitude towards the close of the 18th century that a gradual divergence of views began.<sup>7</sup>

The problems presented by forged indorsements have accompanied the development of the indorsement as a means to transfer bills of exchange.<sup>8</sup> Indorsements made their first appearance in Italy at the close of the sixteenth century but were little used there throughout the seventeenth century.<sup>9</sup> In France indorsements appear first about 1620, and their use grew rapidly;<sup>10</sup> from there they were imported into the other European countries,<sup>11</sup> including England where they appear before 1650. Malynes in his famous *Lex Mercatoria* (1622) does not mention them,<sup>12</sup>

3. GENEVA BILLS OF EXCHANGE ACT, art. 16(2); GENEVA CHECK ACT, art. 21; Hudson and Feller, *loc. cit. supra* note 2.

4. GENEVA BILLS OF EXCHANGE ACT, art. 40; GENEVA CHECK ACT, art. 35.

5. BILLS OF EXCHANGE ACT, § 24; NEGOTIABLE INSTRUMENTS LAW, § 23.

6. BILLS OF EXCHANGE ACT, § 60.

7. As to the continental origin of the Anglo-American law of negotiable instruments, see 8 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (1937) 146, 151; 2 STREET, *FOUNDATIONS OF LEGAL LIABILITY* (1906) 359.

8. The early history of the indorsement is still obscure. See SCHAPS, *ZUR GESCHICHTE DES WECHSELINDOSSAMENTS* (1892); 1 GRUENHUT, *op. cit. supra* note 1, at 87 *et seq.*

9. BIENER, *WECHSELRECHTLICHE ABHANDLUNGEN* (1859) 139 *et seq.*; 1 GRUENHUT, *op. cit. supra* note 1, at 88, n. 6. But see GOLDSCHMIDT, *UNIVERSALGESCHICHTE DES HANDELSRECHTS* (1891) 451.

10. SAVARY, *PARÈRES* 80, 82 (1688), 2 *LE PARFAIT NÉGOCIANT* (1715) 588, 602; 1 GRUENHUT, *op. cit. supra* note 1, at 87, n. 2; LEVY-BRUHL, *HISTOIRE DE LA LETTRE DE CHANGE EN FRANCE AU 17IÈME ET 18IÈME SIÈCLES* (1933) 103 *et seq.* Up to this time bills of exchange were only transferable in a limited way, *i.e.*, by giving the transferee a power of attorney to collect the bill. See further, BRUNNER, *Das Französische Inhaberpapier des Mittelalters* (1879) in 1 *ABHANDLUNGEN*, 487 *et seq.*

11. 8 HOLDSWORTH, *op. cit. supra* note 7, at 155; KUNTZE, *WECHSELRECHT* in 4 ENDEMANN, *HANDBUCH DES DEUTSCHEN HANDELS UND WECHSELRECHTS* (1884) 23 *et seq.*

12. Neither does ROBERTS, *THE MERCHANT'S MAP OF COMMERCE* (1st. ed. 1638, 2d. ed. 1671). The first statutory provision mentioning indorsements in Great Britain

but Marius in his equally influential *Advice Concerning Bills*, first published in 1651, deals with them extensively, giving many illustrations of indorsements.<sup>13</sup>

Since forgeries were quite frequent in the seventeenth century,<sup>14</sup> it is not surprising that statutes of the time attempted to protect innocent parties against such danger. Thus, as early as 1607 there was a statute in Naples prohibiting more than one indorsement and requiring the signature of the indorser—the payee—to be authenticated by a notary public.<sup>15</sup> The purpose of this provision was to safeguard the acceptor or drawee against the danger of a payment to a holder claiming under an indorsement to which the signature of the payee was forged,<sup>16</sup> for such a payment did not discharge the acceptor's or drawee's obligation. The contemporary legal literature regarded an indorsee either as the agent of the indorser or (later) as the latter's assignee.<sup>17</sup> He could, therefore, according to the seventeenth century writers, acquire no greater rights than those had by his indorser,<sup>18</sup> and only an indorsement coming from the true owner could transfer title.<sup>19</sup> A forged indorsement, on the other hand, could not deprive the true owner of his rights. As a consequence, the acceptor who paid to the holder under a forged indorsement had to pay again to the true owner, at the time the forgery was committed, of the instrument, and a drawee could not debit the drawer with the amount of such a payment. A very clear statement of the law to this effect can be found in Savary's famous *Parfait Négociant*,<sup>20</sup> which appeared first in 1675 and was translated into nearly all the European languages.

The first reported case dealing with the effect of a forged indorsement, a French decision of 1755, used the then conventional arguments to defeat

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is a Scottish act of 1681. It established a summary procedure for foreign bills and for their registration with the court "at the instance of the person to whom the same is made payable or his order, either against the drawer or indorser, in case of protest for non acceptance or against the acceptor in case of protest for non payment." GLEN, *A TREATISE ON THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES AND LETTERS OF CREDIT IN SCOTLAND* (2d ed. 1824) 265.

13. 8 HOLDSWORTH, *op. cit. supra* note 7, at 156, n. 1. Marius, however, uses the term "assignment" instead of "indorsement."

14. LEVY-BRUHL, *op. cit. supra* note 10, at 215.

15. PRAGMATICA III DE LITTERIS CAMBII, Nov. 8, 1607, art. 14; PRAGMATICA V. of July 9, 1617, art. 5; MARTENS, *URSPRUNG DES WECHSELRECHTS* (1797) ANHANG 77.

16. 1 GRUENHUT, *op. cit. supra* note 1, at 88, n. 6; TREITSCHKE, 1 *ENZYKLOPAEDIE DES WECHSELRECHTS* 508.

17. LEVY-BRUHL, *op. cit. supra* note 10, at 214; SCHAPS, *op. cit. supra* note 8, at 97 et seq.; 8 HOLDSWORTH, *op. cit. supra* note 7, at 142.

18. "Le porteur est subrogé en tous les droits, noms, raisons et actions de son indosseur et c'est pourquoi il les exerce sur l'indosseur de son dit indosseur et contre le tireur." SAVARY, *PARERE* 16 (1682).

19. 1 PARDESSUS, *TRAITE DU CONTRAT ET DES LETTRES DE CHANGE* no. 299 (1809).

20. SAVARY, 1 *PARFAIT NÉGOTIANT* (1736) 258; DUPUIS DE LA SERRA, *op. cit. supra* note 1, c. 13, nos. 1-11, 13-15.

a bona fide purchaser's claim on the instrument.<sup>21</sup> Here the forgers, who had been entrusted by the payee to procure the drawee's acceptance, obtained the acceptance, forged an indorsement of the payee to themselves, indorsed the instrument, and then sold it with the help of a note-broker to a bona fide purchaser. Claiming that the instrument ought to be treated "like a coin in their pocket," the bona fide purchaser pleaded that the indorsement to him was genuine and not a forgery, that he had acquired the bill not from a stranger but from a well-known note broker, and that he had no reason to suspect that the indorsement of the real owner was a forgery. But the court, relying upon the old dogma invoked by the plaintiff-payee, decreed that the title was still in the payee and that the acceptor had to pay him and not the bona fide purchaser. About twenty years later, Lord Mansfield decided the first reported English forged indorsement case in the same way.<sup>22</sup> The defendant buyer had accepted a bill of exchange, drawn on him by the seller's servant for the price of merchandise, and had paid it to an indorsee who held the instrument under a forged indorsement of the vendor-payee. When sued by the assignees in bankruptcy of the seller for goods sold and delivered, the defendant pleaded this payment. Lord Mansfield gave judgment for the plaintiff. Distinguishing the case at bar from that of a lost bearer instrument, he held that "he that takes a forged bill must abide by the consequences, for the man whose name is forged knows nothing of it . . . It [the instrument] could not be paid without their [the payees'] hand, and defendant has been negligent in inquiring whether it was their hand or not." In *Smith v. Chester* (1787), the plaintiff indorsee who sued the acceptor was non-suited because he was unable to prove the handwriting of the first indorser.<sup>23</sup> The court did not follow the plaintiff's argument that, since the indorsements under which the plaintiff claimed were present at the time of the acceptance, the defendant could not afterwards dispute them, and that in the case of foreign bills a requirement of proof of the indorser's handwriting would work great hardship.

*Mead v. Young* (1790), generally considered the leading English case on the subject of forged indorsements, concerned a bill payable to Henry Davis or order which was sent by the mail from Dunkerk to London and came into the hands of another Henry Davis who offered it to the plaintiff.<sup>24</sup> Before discounting the bill from Davis, who was a stranger,

21. DÉNISART, 3 COLLECTION DES DÉCISIONS NOUVELLES (1771) 131 *vo. lettre de change*. In accord is decision of February, 1761, cited in ROGUE, JURISPRUDENCE CONSULAIRE 349.

22. Aaron Smith and another, assignees of Bagnall and Hand v. Shepperd, Hil. T. 16 Geo. III, cited in CHITTY, BILLS OF EXCHANGE (1st ed. 1799) 126, n. 4.

23. 1 T. R. 654 (1787).

24. 4 T. R. 28 (1790); see further, Gibson v. Minet 1 H. Bl. 569 (1791).

the plaintiff, upon inquiry, was assured by the defendant, who had accepted the instrument at the request of Davis, that it was his acceptance and a good bill. The defendant acceptor offered evidence to show that the Henry Davis who indorsed the bill was not the person in whose favor it was drawn. The majority of the court held that unless the indorsement was by the person to whom the bill was really payable, it was a forgery and could confer no title. The most interesting aspect of the case is that the judges did not confine themselves to the conventional legal arguments, but talked for the first time in practical terms and weighed the interests of an indorsee against those of the other parties. The policy arguments advanced are indicated in the contrasting views of Buller, J. and Chief Justice Kenyon. According to the former the plaintiff who cannot recover on the bill

"will proceed against the forger and that would be the case, even if the instrument had passed through several hands, because each indorser would trace it up to the person from whom he had received it, and at last it would come to him who had been guilty of the forgery, whereas if the plaintiff succeeded in this action, he will have no inducement to prosecute for the forgery. The drawer, on whom the loss would in that case fall, might have no means of discovering the person who committed the forgery, and then he could probably escape punishment. As far, therefore, as convenience can have any effect, it weighs strongly with me to receive the evidence. But, at all events, plaintiff cannot recover, since he derives his title under a forged indorsement."

Chief Justice Kenyon, on the other hand, thought it was the drawer's fault

"in not describing more particularly the person to whom he intended it should be paid. Plaintiff was not bound to send to Dunkerk to know whether the person who had possession of the bill was or was not the real H. Davis. There may be, however, some inconvenience the other way; but setting this inconvenience on the one side against that on the other, in my opinion it would throw too great a burden on persons taking bills of exchange to require proof of an indorser that the person from whom he received the bill was the real payee. Such proof has never yet been required of an indorsee in such an action and, therefore, I think, as there was no fraud or want of due diligence on the part of the plaintiff, he is entitled to recover."

The rule given us by these leading English cases, that even a bona fide purchaser can acquire no title under or through a forged indorsement and that a bona fide payment of an instrument tainted with such forgery does not bar a subsequent action by the true owner against an acceptor or prior parties, has been followed by the courts both in England

and in this country<sup>25</sup> and has been incorporated in the Negotiable Instruments Law, and with some qualifications, in the Bills of Exchange Act.<sup>26</sup> It has assumed, moreover, a great practical importance because of the broad application by the courts of the term, forged indorsement. As *Mead v. Young* and the cases following its authority show, a forged indorsement is present not only where the transferor's real name is different from the name under which he indorses but also where he bears the same name but has no actual title to the instrument. Furthermore, according to many courts, an unauthorized indorsement by an agent, unless he is acting within the scope of his general authority and is violating only special instructions, amounts to a forgery. This wide application of the forgery doctrine has probably prevented some courts from giving to bona fide purchasers the benefit of the apparent authority rule.<sup>27</sup> On the other hand, the forgery concept has received some limitations, as we shall see, in the imposter and fictitious payee situations.<sup>28</sup> The policy behind the Anglo-American law is, as the line of cases sired by *Mead v. Young* clearly indicates, to put the loss on the person who bought from the forger. This rule, evolved out of cases with rather simple sets of facts, has survived till now and has been applied over and over again, and we shall see, to complex present day situations. In applying the rule that no purchaser can take title under a forged endorsement, the courts apparently still feel that the equities in favor of the owner at the time of forgery are superior to those of a purchaser from a forger, the business philosophy being that one should buy negotiable paper only from a person in whose integrity one can trust. But the negligent mailing and imposter cases reveal a tendency to break away from the rule and to recognize that there are situations in which the equities of the purchaser are superior.

As opposed to the English history of the rule of forged indorsements, there began on the continent in the middle of the eighteenth century a gradual breaking away from the traditional doctrine. The attacks on the old dogma concentrated first on the rule which denied protection to the bona fide payor. It was pointed out that when the old rule was carried out consistently, the drawee (acceptor) was forced to assure himself not only of the title of the presentor but also that of all the latter's predecessors; and this put too heavy a burden on a conscientious drawee, particularly a banker, while enabling, on the other hand, a recalcitrant debtor to gain time by demanding that the presentor verify indorsements under which he claimed title. It was felt that this result would paralyze completely the use of bills of exchange, the utility of which depended

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25. CHITTY, *op. cit. supra* note 22, at 110, 123, 124.

26. BILLS OF EXCHANGE ACT, § 24; NEGOTIABLE INSTRUMENTS LAW, § 23.

27. *Standard Steam Specialty Co. v. Corn Exchange Bank*, 220 N. Y. 478, 116 N. E. 386 (1917).

28. *Infra*, p. 893.

upon their prompt liquidation at maturity. The claim was also made that since as a matter of business practice the holder could demand payment of the drawee without having to prove the genuineness of all prior indorsements, a usage which had found approval by the courts, the payor, as a counterbalance, needed protection against a double payment.<sup>29</sup> Under the pressure of this criticism the Parlement de Paris, as early as 1787, three years before *Mead v. Young*, regarded the acceptor who had made a payment in good faith to an indorsee under a forged indorsement as discharged.<sup>30</sup> This rule was carried over into Article 145 of the French Commercial Code of 1807 which provided for a presumptive discharge of the person who pays at maturity, unless he has been notified not to pay.<sup>31</sup> A limited application of this rule was in turn incorporated into the English Stamp Act of 1853,<sup>32</sup> and thence into Section 60 of the Bills of Exchange Act.

The rule protecting the bona fide drawee or acceptor was the only deviation from the traditional strict Continental theory in France until 1935, when she adopted, with the enactment of the Geneva Uniform Laws, the German theory of giving protection to the bona fide indorsee as well. Since the beginning of the eighteenth century German business circles had severely criticized the old rule as being detrimental to commerce and its chief instrumentality, the bill of exchange. A transferee,

29. 1 PARDESSUS, *op. cit. supra* note 19, nos. 294 *et seq.*; LEVY-BRUHL, *op. cit. supra* note 10, at 217 *et seq.* *Acte de Notoriété de la Conservation de Lyon of 1732*, reported in 3 DÉNISART (1751) 538 *vo. ordre*; *Arrêt du Parlement de Flandres*, of March 12, 1783, reported in MERLIN, REPERTOIRE 281 *vo. indorsement*.

30. 3 DÉNISART, *op. cit. supra* note 21, at 597 *vo. indorsement*.

31. NOUGIER, *DES LETTRES DE CHANGE* (4th ed. 1875) nos. 333-339.

32. 16 and 17 Vict. c. 59, § 19. The reasons for this change are succinctly stated by Chief Justice Cockburn in *Charles v. Blackwell* (1877) 2 C. P. D. 151, at 156:

"Now the purpose of the enactment we are dealing with was, when cheques payable to order were expected to become general, to protect bankers against the possibility of forged indorsements . . . Against forgery of the writing of his own customers the banker must be assumed to be capable of protecting himself. He is, or ought to make himself acquainted with the signatures of his own customers. He cannot be acquainted with the signatures of the multitude of payees or agents who may have to indorse cheques drawn upon him and made payable to order. It was not unreasonable, therefore, that while the customer obtained the advantage of being able to draw cheques payable to order, the possibility of forged indorsements should be, as between him and the banker, at his risk. By making a cheque payable to order, the drawer obtained the advantage that if the cheque is stolen or lost before it reaches the payee, it cannot be paid without a forged indorsement, the risk of which many persons, who would not scruple to present a cheque payable to bearer, in fraud of the true owner, and pocket the proceeds, might yet be unwilling to run. Furthermore, he obtains through the indorsement of the payee an acknowledgment of the receipt of the cheque and of its payment. Obtaining this benefit, it was but reasonable that the possibility of a forged indorsement should be at his risk, or at all events be a question between him and the payee, leaving the banker free from liability . . ."

it was said, could only be expected to examine the external regularity of the chain of indorsement, and never did anything more when investigating the title of his transferor; and it was demanded that this business practice should be legalized to make it possible for bills of exchange to circulate like money.<sup>33</sup> The opponents of the old rule were partly successful already in the Allgemeine Preussische Landrecht, and completely in the later Allgemeine Deutsche Wechselordnung,<sup>34</sup> when they introduced into this statute the doctrine that the chain of indorsements is not interrupted by a forged one and that even the indorsee who buys from the forger acquires a perfect title if he is not grossly negligent in mistaking the forger-indorser for the true owner.<sup>35</sup> Thus, by the middle of the nineteenth century, the German law had gone the whole way in breaking with the traditional view that an indorsee is his indorser's assignee. Under the new theory the title of a bona fide indorsee is not in the least derivative, that is, dependent upon the previous indorser's title, but is completely independent. If the indorsee is bona fide, *i.e.*, not grossly negligent, he always acquires title even if his predecessor had none, provided there is an indorsement to him plus delivery. With the title he acquires the rights incorporated in the instrument against all prior parties whose promises are binding, irrespective of whether there are non-binding promises in between, because the individual promises are independent of each other. It was this German currency theory that was taken over without much discussion into the Geneva Codes.

The essence of this solution reached in the civil law countries is said to be as follows: the purported indorser is—subject to certain exceptions—not liable to any subsequent purchaser, but he loses his "title" to the instrument, that is, he cannot collect on the instrument if the acceptor pays to a bona fide holder. The American rule is more favorable to the purported indorser; he is neither liable to subsequent purchaser nor does he lose his "title." But this description of the contrast is not entirely accurate. A closer examination of the Continental system reveals that the purported indorser is even less protected than it might at first appear. Since the subsequent purchaser acquires a valid title despite forgery of a prior indorsement, he has a cause of action not only against the acceptor, if there is one, but also, in case of dishonor, against all secondary parties, prior or subsequent to the forgery, with the exception of the purported indorser. If, for example, the payee's signature has been

33. TREITSCHKE, HANDBUCH DES WECHSELRECHTS (1824) §§ 236 *et seq.*; 2 THOEL, HANDELSRECHT (4th ed. 1878) 686 *et seq.*

34. PREUSSISCHES LANDRECHT OF 1794, II 8 §§ 835, 1156, 1169; 1 GRUENHUT, *op. cit. supra* note 1, at 226, n. 5; ALLGEMEINE DEUTSCHE WECHSELORDNUNG OF 1848, art. 36, 74, 76.

35. 2 THOEL, *loc. cit. supra* note 33, at 693; THOEL, PROTOKOLLE DER LEIPZIGER WECHSELKONFERENZ (1866) 151.



forged, the purchaser has a cause of action against the acceptor, or, in case of dishonor, against the drawer. If the acceptor or the drawee pays him, he can keep the proceeds. This payment entitles the drawee or acceptor to debit the drawer's account, and the latter in turn will debit the account of the payee. If, in case of dishonor, the drawer takes up the instrument, he again can debit the payee's account. Thus, the payee, although he is not directly liable on this purported indorsement to any subsequent purchaser, indirectly has to pay for the instrument in the situations mentioned above, so that only in cases where the acceptor and drawer are insolvent does the non-liability of the payee on his purported indorsement become of practical importance; where these parties are solvent, the payee is ultimately charged.

To sum up: The old Continental tradition has been preserved up to the present time in the Anglo-American system, in England, however, with a qualification in favor of a bona fide banker. The Continental systems, however, have broken away since the eighteenth century from the rule they originated; some systems, like the French, departed only gradually in favor of a bona fide payor; others, like the German, broke radically from the old view. Finally, the German doctrine has been adopted in all the civil law systems with the introduction of the Geneva Codes so that nowadays the schism between the Anglo-American and the Continental systems is complete.<sup>36</sup>

## II.

The continental rule, it has been shown, was quick to respond to broad arguments of policy; while originally favoring the true owner it gave way, first in Germany and later in the Geneva codes, before the propaganda of business that the purchaser must be protected for the good of commerce. The Anglo-American courts, on the other hand, have been generally reticent to depart from the philosophy of the early cases which placed the loss upon the recipient from the forger either because he had taken negligently from a stranger or because he, and not the purported endorser, was better fitted to pursue the forger; and that philosophy has been articulated in the legal doctrine, first enunciated in *Mead v. Young*, that persons subsequent to the forged endorsement can take no title to the instrument. But the rigidity of this rule has been mitigated by recognizing that the true owner may be "precluded" from setting up the forgery of his signature. Therefore, before any attempt can be made to determine in the abstract whether the Anglo-American or the Continental is the better general rule, we must examine the cases that have been decided under the American rule and its exceptions. The theory under which the exceptions are subsumed is, it

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36. HUPKA, DAS EINHEITLICHE WECHSELRECHT (1934) 22 *et seq.*

would seem, elastic enough to adapt the traditional rule to the equities of each individual case. It could enable a court to decide every case by weighing the comparative negligence of the respective parties. Lord Mansfield had already seen the problem of the forged endorsement in this light in the first reported English case on the problem:

"Each party is innocent (of the forgery crime); the question is, on whom the loss must fall?—it should be on him who is most in fault."<sup>37</sup>

The decision in other cases might be influenced by further equitable considerations, ratification, estoppel, and the like, as well as by considerations of commercial expediency. However, matters of policy, or considerations of equity, have, in this country particularly, been slow to overcome the rigor of the Anglo-American doctrine. Rather, an elaborate protection for the true owner, with exceptions in only a limited number of instances, has been built upon a philosophy designed to place ultimate liability upon the purchaser who took from the forger.

It might be well to indicate first the status of the various parties affected by a forged indorsement under the Anglo-American rule before examining the qualifications made upon it. The protection afforded the true owner must necessarily affect the subsequent purchasers, drawee and acceptor, and prior secondary parties. Furthermore, the protection of the true owner naturally affects the relation of all those parties among themselves; their relation *inter se* has to be adjusted to the extent of the protection given to the owner. It is, therefore, not surprising that we find in the Anglo-American law a system of rules and counter-rules attuned to each other which has no counterpart in the modern Continental law.

*Subsequent Purchasers.* The hornbooks have it that no subsequent purchaser, however bona fide, can acquire title to an instrument to which an indorsement has been forged. This is not altogether true. It is correct that he cannot enforce payment against an acceptor<sup>38</sup> nor, in case of dishonor, against secondary parties prior to the forgery.<sup>39</sup> Yet, the

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37. *Smith v. Shepperd*, note 22, *supra*.

38. *Mead v. Young*, 4 T. R. 28 (1890); *BILLS OF EXCHANGE ACT*, § 24; *NEGOTIABLE INSTRUMENTS LAW*, § 23.

39. *BILLS OF EXCHANGE ACT*, § 24; *NEGOTIABLE INSTRUMENTS LAW*, § 23. It makes no difference whether the forgery has been committed by a stranger or by a dishonest employee of the prior party. The efforts of purchasers to hold a prior party or a purported endorser on a forgery committed by an agent on the basis of *respondet superior* have in general been without success. *Manufacturers Bank v. Prudential Insurance Company*, 102 Misc. 339, 168 N. Y. Supp. 913 (Sup. Ct. 1918); *Ocala Nat. Farm Loan Ass'n v. Munroe and Chambliss Nat. Bank*, 89 Fla. 242, 103 So. 609 (1925). But see *Pyper v. Climer*, 29 Ohio App. 486, 163 N. E. 640 (1928), (1929) 42 HARV. L. REV. 949. Here the defendant-payee of a check gave it undorsed to

subsequent purchaser is not entirely out of luck; he has a cause of action not only against the immediate transferor for the purchase price he has paid<sup>40</sup> but against all parties subsequent to the forgery for the face amount of the bill, all such parties having breached the so-called implied warranty of genuineness of the instrument.<sup>41</sup> The rights arising out of the breach of these implied warranties are not, however, predicated upon due presentment and timely notice of dishonor.<sup>42</sup> They accrue immediately upon transfer.<sup>43</sup> Furthermore, since an indorsement is regarded as the drawing of a new bill, and since, therefore, the validity of the indorsements of all the parties subsequent to the forgery is not affected by the lack of liability to subsequent purchasers of the parties prior to the forgery, the purchaser has despite a forged indorsement, in case of dishonor, an additional remedy against any indorser subsequent to the forgery for dishonor.<sup>44</sup> Under this new-bill doctrine, the title to

an agent with instructions not to indorse it but to deposit it as security. Breaching his instructions, the agent forged the defendant's indorsement and transferred the check to the plaintiff bona fide purchaser. The defendant was held to be precluded from setting up the forgery defense.

40. *Ritchie v. Summers*, 3 Yeates 531 (Pa. 1803); *Canal Bank v. Bank of Albany*, 1 Hill 287 (N. Y. 1841); *Terry v. Bissell*, 26 Conn. 23 (1857). The rationale of these cases is that the purchaser has not received the genuine indorsement he bargained and paid for.

41. The right of the indorsee to sue his immediate indorser for the face amount of the instrument on the implied warranty of genuineness of the instrument has been generally recognized by American courts and has been incorporated into the Negotiable Instruments Law, §§ 66, 65(1) and (2). Section 66 makes it clear that the purchaser can sue every party subsequent to the forgery.

42. NEGOTIABLE INSTRUMENTS LAW, § 66; *Canal Bank v. Bank of Albany*, 1 Hill 287 (N. Y. 1841); *Turnbull v. Bowyer*, 40 N. Y. 456 (1869); *Blethen v. Lovering*, 58 Me. 437 (1870) *semble*; *Ames, The Negotiable Instruments Law* (1900) 14 HARV. L. REV. 241, 251.

43. *Blethen v. Lovering*, 58 Me. 437 (1870). This action for money had and received accrues as soon as the seller-indorser is credited with the proceeds. *Federal Reserve Bank of Atlanta v. Atlanta Trust Co.*, 91 F. (2d) 233 (C. C. A. 5th, 1937). See (1938) 47 YALE L. J. 827.

44. *Warren-Scharf Co. v. Commercial Nat. Bank*, 97 Fed. 181 (C. C. A. 5th, 1899). In this action no proof of prior signatures is required since the indorser warrants these. BIGELOW, *THE LAW OF BILLS, NOTES AND CHECKS* (3d ed. 1928) § 493; *ex parte Clarke*, 3 Bro. C. C. 238, ch. 1791 (1791); *Lambert v. Paclt*, 1 Salk 127, (K. B. 1795); *Critchlov v. Parry*, 2 Camp. 182, N. P. 1809; *McGregor v. Rhodes*, 6 El. & Bl. 266, (K. B. 1856); *State Bank v. Freeman*, 33 Mass. 535 (1835). This remedy is quite distinct from that arising out of the warranty of genuineness. It is predicated upon due presentment and notice of dishonor and is therefore probably not available to a purchaser who has collected the proceeds. The remedy for breach of the warranty of genuineness, on the other hand, is in such a case available to the purchaser since he is not entitled to keep the proceeds. Furthermore, in order to use the remedy for breach of the warranty of genuineness, the purchaser need not await maturity. Finally, the cause of action against secondary parties for dishonor is not available to a holder under a qualified indorsement such as a bank acting as collecting agent under indorsement for collection.

the instrument is split. The "true owner" retains his rights against all prior parties and against the acceptor, while the subsequent purchaser has recourse against all secondary parties subsequent to the forgery.

Most of the cases dealing with suits by the true owner against the subsequent purchaser concern a purchaser who has collected the proceeds of the instrument.<sup>45</sup> The recipient, it is uniformly held, has to pay to the true owner the amount received from the drawee. The true owner may sue the recipient in trover for conversion<sup>46</sup> or, waiving conversion, in assumpsit for money had and received to his use.<sup>47</sup> Since the purchaser has collected the money, the measure of recovery is the same under either theory.<sup>48</sup> And courts do not allow the defense that the recipient has already paid the money he has received to a prior party,<sup>49</sup> even in the case where the true owner sues for money had and received. Many of the cases dealing with the recovery of the true owner against the recipient involve suits by the payee of a mailed check who never received it, but only a few cases consider the bearing of the absence of delivery.<sup>50</sup> The few authorities dealing explicitly with the problem have

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45. However, the liability of the intermediate parties for conversion or for money had and received is not doubtful. See *Stern v. President and Directors of Manhattan Co.*, 134 Misc. 351, 235 N. Y. Supp. 634 (Sup. Ct. 1929); *Crisp v. State Bank of Rolla*, 32 N. D. 263, 155 N. W. 78 (1915).

46. The first reported case allowing recovery for conversion is apparently *Down v. Halling*, 4 B. & C. 370, (K. B. 1825). See further, *Talbot v. Bank of Rochester*, 1 Hill 295 (N. Y. 1841). For a collection of cases, see Notes (1923) 31 A. L. R. 1068, (1928) 67 A. L. R. 1531, 8 AM. JURISPRUDENCE 318, n. 8, 319, n. 12.

47. *Independent Oil Men's Ass'n v. Fort Dearborn Nat. Bank*, 311 Ill. 278, 128 N. E. 458 (1924); *Merchants & Manufacturers' Ass'n v. First Nat. Bank of Mich.*, 40 Ariz. 531, 14 P. (2d) 717 (1932); *Roracker v. Commercial State Bank*, 191 Minn. 553, 254 N. W. 824 (1934); *Nat. Union Bank of Md. v. Miller R. Co.*, 148 Md. 449, 129 Atl. 688 (1925). *Contra*: *Tibby Bros. Glass Co. v. Farmers & Mechanics Bank of Sharpsberg*, 220 Pa. 1, 69 Atl. 280 (1908). The court based its denial of recovery on the theory that there was no more privity between payee and recipient than between payee and drawee bank. A further ground for the decision was that the recipient did not receive money belonging to the plaintiff but money which belonged to the drawee bank, since the drawee's payment did not affect the payee's claim against the drawee on the latter's account with the drawee bank. The majority of cases, on the other hand, have held that the rule denying recovery to the payee against the drawee bank does not apply to a suit of the payee against the recipient. The *Tibby* case has been overruled by *Lindsley v. First Nat. Bank of Philadelphia*, 190 Atl. 876 (Pa. 1937).

48. As to a possible difference in pleading, see *Universal Car Loading and Distributing Co. v. South Side Bank*, 224 Mo. App. 816, 27 S. W. (2d) 768 (1930).

49. *Farmers v. Bank*, 100 Tenn. 187, 47 S. W. 234 (1897); *Buckly v. Second Nat'l Bank*, 35 N. J. L. 400, 10 Atl. 249 (1872); *United States Portland Cement Co. v. United States Nat'l Bank of Denver*, 61 Colo. 334, 157 Pac. 202 (1916). It apparently makes no difference whether the recipient is a purchaser or merely a collecting agent under a restrictive indorsement; but an extension of the rule in *Pratt v. Higginson*, 230 Mass. 256, 119 N. E. 661 (1918), to protect a collecting agent is not impossible. As to the protection of the recipient agent when sued by the drawee, see *infra* note 62.

50. For collection of cases, see Note (1923) 31 A. L. R. 1071.

either held delivery to be immaterial<sup>51</sup> or have treated the suit by the payee as sufficient a ratification of the drawer's mailing of the check to constitute a constructive delivery to the payee.<sup>52</sup>

Should the true owner proceed against the recipient to recover the proceeds of the instrument, the latter may, as we have seen, sue on the implied warranty of genuineness against every indorser subsequent to the forgery.<sup>53</sup> A recovery from the recipient by the true owner transfers "title" of the instrument to the former, so that the recipient, having paid the rightful owner, is no longer liable to the drawee for the proceeds received from him.<sup>54</sup> Payment to the true owner has discharged the instrument. The acceptor and the parties secondarily liable are, therefore, likewise no longer liable to the previous owner.<sup>55</sup> The drawee who has paid the subsequent purchaser can now, of course, debit the drawer's account for the amount paid. The person who then has to bear the ultimate loss is the indorsee who has bought the instrument from the forger, for he has only an empty right against the forger.

*Acceptor and Drawee.* The acceptor is liable only to the true owner; he is not to any holder taking subsequent to a forged indorsement.<sup>56</sup> A

51. *Allen v. Mendelsohn & Son*, 207 Ala. 527, 93 So. 416 (1922), (1923) 21 MICH. L. REV. 819.

52. *Crisp v. State Nat. Bank of Rolla*, 32 N. D. 263, 155 N. W. 78 (1915); *Indiana Nat. Bank v. Holtschaw*, 98 Ind. 85 (1884). As to the right of the remitter to sue the recipient for conversion, see *Talbot v. Rochester Bank*, 1 Hill. 295 (N. Y. 1841). The right of the drawer as true owner to recover from the recipient if the signature of the payee who never received the instrument was forged by the drawer's agent has been recognized on a conversion or money had and received rationale in the following decisions: *Life Insurance Co. v. Edisto National Bank*, 166 S. C. 505, 165 S. E. 178 (1932); *Gustin-Bacon Manufacturing Co. v. First National Bank*, 306 Ill. 179, 137 N. E. 793 (1922); *Labor Bank and Trust Co. v. Adams*, 23 S. W. (2d) 814 (Tex. Civ. App. 1930). See *Railroad Building Loan and Service Association v. Bankers Mortgage Co.*, 142 Kan. 504, 51 P. (2d) 61 (1935).

The result seems to be different if the instrument was already received by the payee through his dishonest agent. In this case only the payee can recover. The drawer is precluded from recovery since he has neither title nor right of possession to the instrument. *United States v. Bank of Coney Island*, 36 F. (2d) 829 (N. D. Okla. 1929).

53. Note 41, *supra*.

54. *Talbot v. Bank of Rochester*, 1 Hill 245 (N. Y. 1841).

55. *Haas v. Twenty-Third Ward Bank*, N. Y. L. J., Jan. 29, 1921, *aff'd*, 200 App. Div. 895 (1st Dep't 1922). In *United States Portland Cement Co. v. United States National Bank*, 61 Colo. 334, 157 Pac. 202, (1916), the court assumed that the suit of the true owner against the recipient released the drawer and drawee from the duty of paying over again since such a suit amounted to a ratification of the assumed payment. *Accord*: *Independent Oil Men's Association v. The Fort Dearborn Nat. Bank*, 311 Ill. 278, 142 N. E. 458 (1924). In *Moler v. State Bank of Bigelow*, 176 Minn. 449, 233 N. W. 780 (1929), the payee was given judgment against both the collecting and the drawee bank for conversion.

56. *BILLS OF EXCHANGE ACT*, § 24; *NEGOTIABLE INSTRUMENTS LAW*, § 23.

payment to a purchaser holding under or through a forged indorsement does not discharge the acceptor's obligation to the true owner.<sup>57</sup> The acceptor (or drawee) who pays under a forged indorsement cannot debit the drawer's account with such payment<sup>58</sup> unless the intended payee has ultimately received the proceeds.<sup>59</sup> The true owner may, instead of suing the recipient, proceed against the acceptor, who in turn may recover the money he has paid the recipient.<sup>60</sup> The recipient can then sue any of the indorsers subsequent to the forgery on their implied warranty of the genuineness of the instrument.<sup>61</sup> If the recipient, however, is a bank acting only as a collecting agent under a restrictive indorsement, it can defeat the drawee's recovery by pleading that it turned over the proceeds to its indorser,<sup>62</sup> unless it has given a guarantee of all

57. *Smith v. Shepperd*, note 22, *supra*; *Cheape v. Harley*, cited in *Allen v. Handy*, 3 T. R. 127 (1789).

58. The drawee-bank owes the drawer the absolute duty of paying only on his authentic order and only to a holder under genuine indorsements. If the bank has paid on a forged indorsement, it makes no difference how careful the bank was in making payment or how impossible of detection the forgery was. The risk is assumed by the bank and not the drawer-depositor, unless the bank can claim protection because of negligence chargeable to the depositor. *Los Angeles Inv. Co. v. Home Savings Bank*, 180 Cal. 601, 182 Pac. 293 (1919); *Shipman v. Bank of State*, 126 N. Y. 318, 27 N. E. 371 (1891); *Gutfreund v. East River Nat. Bank*, 251 N. Y. 58, 167 N. E. 171 (1929); *United States Cold Storage Co. v. Central Mfg. District Bank*, 343 Ill. 503, 175 N. E. 825 (1931); *American Sash and Door Co. v. Commercial Trust Co.*, 56 S. W. (2d) 1034 (Mo. Sup. Ct. 1932); *Detroit Piston Ring Co. v. Wayne County and Home Savings Bank*, 252 Mich. 163, 233 N. W. 185 (1930); *Comment* (1935) 33 MICH. L. REV. 759. There is a split of authority on the question of whether the drawer's right to demand recrediting of his account is conditioned upon his surrendering the forged instrument to the drawee (in return for security or a receipt) to enable the drawee-bank to proceed further against prior indorsers. *Redington v. Woods*, 45 Cal. 406 (1873); *Van Wert National Bank v. First National Bank*, 6 Ohio C. C. 130 (1891); *Showers v. Merchants National Bank*, 293 Pa. 241, 142 Atl. 275 (1928), (1928) 42 HARV. L. REV. 125. *Contra*: *United States v. National Bank of Commerce*, 205 Fed. 433 (C. C. A. 9th, 1913).

59. *Beeson More Shoe Co. v. Clark County Bank*, 160 Ark. 385, 254 S. W. 667 (1923); *Yanowe Co. v. American Exchange Irving Tr. Co.*, 226 App. Div. 530, 234 N. Y. Supp. 603 (1st Dep't 1929). But *cf.* *Shipman v. The Bank of the State of New York*, 126 N. Y. 318, 27 N. E. 371 (1891).

60. Note 69, *infra*.

61. Note 41, *supra*.

62. See *Canal Bank v. Bank of Albany*, 1 Hill 287 (N. Y. 1841); *Holt v. Ross*, 54 N. Y. 472 (1873); *cf.* *National Park Bank v. Seaboard Bank*, 114 N. Y. 28, 20 N. E. 632 (1890) (checks raised and name of payee altered); *National City Bank v. Westcott*, 118 N. Y. 468, 23 N. E. 100 (1890) (raised check); *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 139 Cal. 564, 73 Pac. 456 (1903); *WOODWARD, QUASI CONTRACTS* (1913) §27; (1929) 42 HARV. L. REV. In such a case the payor may recover from the principal. *Star Fire Ins. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442 (1881). A restrictive indorsement by the recipient, however, has no such effect. *Citizens Nat. Bank v. City Nat. Bank*, 111 Iowa 211, 82 N. W. 464 (1900).

prior indorsements.<sup>63</sup> Upon receiving notice from the drawee bank that it has collected a check on a forged indorsement, the collecting bank need not wait until sued by the drawee before taking the next step. It may refund the proceeds to the drawee and, where the check was received from a depositor, charge it back against the latter's account.<sup>64</sup>

Many courts have even allowed the true owner of a check to recover the face amount of the instrument from the drawee bank which has paid to the wrong person by holding that such a payment constituted a conversion;<sup>65</sup> other courts have allowed an action for money had and received.<sup>66</sup> This rule has not changed in most jurisdictions despite the introduction of Section 189 of the Negotiable Instruments Law, which declares that the drawing of a check by itself does not constitute an assignment of the underlying funds and further states that the drawee-bank is not liable to the holder unless and until it has accepted or certified the check.<sup>67</sup> A few courts prior to, and even after the Negotiable Instruments Law, have held the drawee-bank which had paid the forged check and charged the drawer's account as an acceptor.<sup>68</sup>

63. WILLISTON, NEGOTIABLE INSTRUMENTS (1931); 2 PATON'S DIGEST (1926) n. 2185a.

64. BRADY, ON BANK CHECKS (2d ed. 1926) § 167; *Oriental Bank v. Gallo*, 112 App. Div. 360, 98 N. Y. Supp. 461 (1906), *aff'd*, 188 N. Y. 610, 81 N. E. 1170 (1907); *Geering v. Metropolitan Bank*, 170 App. Div. 751, 156 N. Y. Supp. 582 (1915).

65. *Schmidt v. Garfield Nat. Bank*, 19 N. Y. Supp. 252, 64 Hun. 293 (1893); *aff'd*, 138 N. Y. 631, 33 N. E. 1084 (1894); *Graves v. The American Exchange Bank*, 17 N. Y. 205 (1858). *Aigler, Rights of Holder of Bill of Exchange Against the Drawer* (1925) 38 HARV. L. REV. 857, 878 *et seq.*

66. See *National Bank of the Republic v. Millard*, 10 Wall. 152 (1896); *NORRIS, BILLS AND NOTES*, (4th ed. 1914) 586. *Contra: First Nat. Bank v. Whitman*, 94 U. S. 343 (1876).

67. Recovery on theory of conversion: *Ellery v. Peoples National Bank*, 114 N. Y. Supp. 108 (Sup. Ct. 1909); *Burstein v. Peoples Trust Co.*, 143 App. Div. 165, 127 N. Y. Supp. 1092 (2d Dep't 1911); *Siegel v. Kovinsky*, 93 Misc. Rep. 541, 157 N. Y. Supp. 340 (Sup. Ct. 1916); *Kansas City Co. v. Westport Ave. Bank*, 191 Mo. App. 287, 177 S. W. 1092 (1915); *Louisville and Nashville R.R. v. Citizens and Peoples National Bank v. Pensacola*, 74 Fla. 385, 77 So. 104 (1917); *Tanner v. Union National Bank*, 283 Ill. App. 159 (1925); *Kentucky Title Savings Bank v. Dunavan*, 205 Ky. 801, 266 S. W. 667 (1924). *Assumpsit: James v. Union National Bank*, 238 Ill. App. 159 (1925), (1926) 26 COL. L. REV. 113; *Independent Oil Men's Association v. Dearborn National Bank*, 311 Ill. 278, 124 N. E. 458 (1924). *Contra: Gordon Fireworks Co. v. Capital National Bank*, 236 Mich. 271, 210 N. W. 263 (1926), (1926) 25 MICH. L. REV. 454; *Lonier v. State Savings Bank*, 149 Mich. 483, 112 N. W. 1119 (1907); *Baltimore & Ohio R.R. v. First National Bank*, 102 Va. 753 (1904). See further, *Chafee, Progress of the Law—Bills and Notes* (1919) 33 HARV. L. REV. 255, 270.

68. *Cf. Pickle v. Muse*, 88 Tenn. 380, 13 S. W. 919 (1890); *Seventh National Bank v. Cook*, 73 Pa. 483 (1873); *Chamberlain Metal Co. v. Bank of Pleasanton*, 93 Kan. 611, 160 Pac. 1138 (1916); *cf. Dawson v. National Bank of Greenfield*, 196 N. C. 134, 144 S. E. 833 (1928); (1929) 38 YALE L. J. 1143, (1931) 25 ILL. L. REV. 343; *cf.*

The acceptor or drawee who has to pay again to the real owner because the debt has not been discharged by the payment to the apparent owner is, of course, entitled to recover from the recipient the amount paid him,<sup>69</sup> the recipient in turn from his transferor, etc., until the forger is reached.<sup>70</sup>

In this respect the English law differs from the American where the instrument bearing the forged indorsement is a demand bill drawn on a banker. According to Section 60 of the Bills of Exchange Act

"it is not incumbent on the banker who has paid such an instrument in good faith and in the ordinary course of business to show that the indorsement of the payee of any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be and the banker is deemed to have paid the

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United States Fidelity and Guaranty Co. v. Jacobs, 287 S. W. 1000 (Tex. Civ. App. 1922). *Contra*: Lone Star Trucking Co. v. City Nat. Bank of Commerce, 240 S. W. 1000 (Tex. Civ. App. 1922); Elyria Savings and Banking Co. v. Walker Bin Co., 92 Ohio St. 406, 111 N. E. 147 (1915); First National Bank v. Whitman, 98 U. S. 343 (1876).

69. For a collection of cases see L.R.A. 1916E 539; BRADY ON BANK CHECKS (2d ed. 1926) § 165, SUPP. (1929) § 165. The same rules apply to the maker of a note. Carpenter v. Northborough National Bank, 123 Mass. 766 (1877); Oil Refining Co. v. Bryant, 110 Okla. 83, 236 Pac. 431 (1925). The drawee or acceptor is under no duty to the recipient to ascertain the genuineness of the chain of indorsements. Corn Exchange Bank v. Nassau Bank, 91 N. Y. 74 (1883). The fact that the payee whose endorsement had been forged is also a customer of a drawee bank does not affect recovery. Missouri Lincoln Trust Co. v. Third Nat. Bank, 154 Mo. App. 89, 133 S. W. 357 (1910).

The courts have rested recovery on different rationales. In many cases it has been based on the quasi contract ground of money paid under mutual mistake. Canal Bank v. Bank of Albany, 1 Hill 287 (N. Y. 1841); First National Bank of Minnesota v. City National Bank of Holyoke, 182 Mass. 130, 65 N. E. 24 (1902). In some cases, the basis has been a warranty of the genuineness of indorsements implied by the presentation and collection of the instrument. United States v. National Exchange Bank of Providence, 214 U. S. 302 (1909). Other cases have used both grounds. Yatesville Banking Co. v. First National Bank, 10 Ga. App. 1 (1911). Still other courts have held the recipient liable as indorser on the basis of the Negotiable Instruments Law §§ 65, 66. American Exchange National Bank v. Yorkville Bank of N. Y., 122 Misc. Rep. 606, 204 N. Y. Supp. 621 (Sup. Ct. 1924); Kleinman v. Chase National Bank of the City of New York, 124 Misc. Rep. 173, 207 N. Y. Supp. 191 (Sup. Ct. 1924). For a criticism of this rationalization, see South Boston Trust Co. v. Levin, 249 Mass. 245, 143 N. E. 816 (1924); First Nat. Bank v. United States Nat. Bank, 100 Ore. 264, 288, 197 Pac. 547, 555 (1921). See in general, Woodward, *Risk of Forgery or Alteration of Negotiable Instruments* (1924) 24 COL. L. REV. 469. Dean Ames preferred to base the recovery of the drawee on a theory of subrogation, but he conceded that as a matter of positive law the acceptor or maker is allowed to proceed directly without first paying the true owner. Ames, *supra* note 1, at 307.

The right of action accrues at the date of payment and the Statute of Limitation begins to run from this date and not only after a demand for repayment has been made. Leather Manufacturers Bank v. Merchants Bank, 128 U. S. 26 (1888); (1938) 47 YALE L. J. 827.

70. Canal Bank v. Bank of Albany, 1 Hill 287 (N. Y. 1841); *cf.* Closter Nat. Bank v. Federal Reserve Bank, 285 Fed. 138 (C. C. A. 2d, 1922), (1923) 32 YALE L. J. 615.



bill in due course, although such an indorsement has been forged or made without authority."

Under this provision the true owner has no cause of action against the banker for conversion nor has he any cause of action against a prior secondary party, since the instrument is discharged.<sup>71</sup> The drawee, moreover, can debit the drawer's account. But the true owner continues to have a cause of action against the recipient,<sup>72</sup> who in turn may recover from his predecessor, and so on until the forger is reached. In theory the solution of the American law leads to the same result.

*Prior Secondary Parties.* A payment by the acceptor or drawee to the wrong holder does not discharge prior secondary parties with respect to the true owner.<sup>73</sup> Instead of suing the recipient or the acceptor, the latter may therefore proceed against these prior secondary parties. Since the liability of secondary parties on the instrument is predicated upon due presentment and due notice of dishonor, it would seem that only after he has performed these conditions does the true owner of the instrument have a claim on the instrument against those parties, even in a case where the instrument has been paid by the acceptor or drawee to the wrong party.<sup>74</sup> This rule is not prejudicial to the true owner since the Negotiable Instruments Law by implication permits him to present a copy of the instrument to the drawee.<sup>75</sup> Against his immediate predecessor, the owner may, of course, also proceed on the underlying claim.<sup>76</sup>

Should the true owner, for example, the payee, fall back on the prior party, in our case, the drawer, the latter could demand from the drawee-bank that his account be recredited; the drawee bank could then in turn recover from the recipient, etc., until the forger is reached. In theory this choice of the true owner may mean a considerable amount of unnecessary litigation which would be largely avoided if the true owner proceeds directly against the recipient.

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71. *Charles v. Blackwell*, 2 C. P. D. 151 (1877).

72. *Ogden v. Benas*, L. R. 9 C. P. 513 (1874); *Arnold v. Cheque Bank*, 1 C. P. D. 578 (1876); but see *BILLS OF EXCHANGE ACT* § 82.

73. (1926) 26 COL. L. REV. 113; but see *James v. Union Nat. Bank*, 238 Ill. App. 159 (1925).

74. The writer of the note in (1926) 26 COL. L. REV. 113 takes the position that in such a situation presentment and notice are dispensed with under the Negotiable Instruments Law, §§ 82, 159, or that at least delay in making presentment or giving notice is excused under §§ 81, 159, 113. See further, *First Nat. Bank of Belle Plaine v. McConnell*, 103 Minn. 340, 114 N. W. 1129 (1903).

75. § 160; *Hinsdale v. Miles*, 5 Conn. 331 (1824); *Kavanaugh v. The Farmers Bank of Maitland*, 59 Mo. App. 540 (1894).

76. *Falconi v. Magee*, 47 Pa. Sup. Ct. 560 (1911); *Siegel v. Kovinsky*, 93 Misc. Rep. 541, 157 N. Y. Supp. 340 (Sup. Ct. 1916); *Thomson v. Bank of British North America*, 82 N. Y. (1880); *Shephard v. Eldridge*, 171 Mass. 516, 51 N. E. 9 (1893). But see *infra* note 97.

Thus the protection given to the true owner of an order instrument against the loss of the instrument by reason of a forgery of his signature is complete. He may proceed either against the subsequent purchaser who has collected the proceeds, or against the acceptor and, possibly, even against the drawee who has paid the instrument to the wrong party, or finally, in case of dishonor, against prior secondary parties. It is obvious that the American rule is designed to place the ultimate liability upon the purchaser from the forger.

### III.

But while the Anglo-American rule appears to give a broad protection to the true owner against liability, *i.e.*, suit by other parties, as well as against loss of title, *i.e.*, the right to sue on the instrument, it has been limited in situations where the other parties, in some cases even the purchaser from the forger, are considered to be more deserving of protection than the true owner. The true owner's unworthiness of protection appears in different shades, and may be distinguished by the following behavior types: (1) He may affirmatively adopt the forged signature as his own, or, upon being asked about the genuineness of his signature, may fail to repudiate the signature. (2) He may not be questioned about the genuineness and may simply refrain, without being asked, from informing one of the other parties, for example, a prospective purchaser known to him or the drawee, of a discovered forged indorsement. (3) Finally, he may fail to discover the forgery, or may enable the committing of an act of forgery, by not using reasonable care. In all these instances, the true owner's behavior may or may not cause injury to one of the other parties. Likewise, lack of reasonable care in discovering a forgery or in giving notice of a discovered forgery may be attributable to one of the other parties in the circle.

*Ratification.* This appears to be a clear case against the true owner, and subsequent purchasers have frequently tried to recover on the instrument from a purported indorser whose signature has been forged where they have been prejudiced by acting in reliance on the ostensible indorser's express adoption of, or silent acquiescence, in the forgery; and suit has sometimes been brought even where there was no prejudice. The Anglo-American, like the German,<sup>77</sup> courts have not hesitated to allow recovery where the plaintiff indorsee had purchased an instrument in reliance on the affirmative answer of the ostensible indorser that the signature was genuine<sup>78</sup> or where such an answer had prevented the

77. Reichsgericht, June 3, 1913, 82 R. G. 337; Reichsgericht, July 6, 1934, 63 JURISTISCHE WOCHENSCHRIFT (1934) 2550.

78. Gluckman v. Darling, 85 N. J. L. 457, 89 Atl. 1016 (1914) (prior indorser's conduct held wilfully misleading); see Woodruff v. Robinson, 33 Md. 146 (1870); cf. Pearson v. Hardin, 95 Mich. 360, 54 N. W. 904 (1893); Leach v. Buchanan, 4 Esp. 226

indorsee who had bought the instrument, from recovering from a solvent forger.<sup>79</sup> In situations of this kind the courts have allowed the purchaser to recover the face value of the instrument, irrespective of the amount of the actual damage suffered, by applying an estoppel or sometimes a ratification rationale.<sup>80</sup> If the purchaser had already collected the proceeds, they have allowed him to keep them under like circumstances. The same kind of protection has been given to a drawee who had paid in good faith and in reliance on such an assertion.<sup>81</sup> If, on the other hand, the purchaser or drawee has been unable to prove that he has suffered actual, and not only conjectural, reliance damages, the majority of the Anglo-American courts, unlike the German courts,<sup>82</sup> have denied recovery.<sup>83</sup> This attitude has frequently found its expression in the formula that "without some element of estoppel or new consideration, a forgery cannot be ratified."<sup>84</sup>

*Failure to give notice of a discovered forgery.* If the purported indorser, instead of adopting affirmatively the forged signature, failed only to notify the purchaser of a discovered forgery, his liability to the purchaser seems to be predicated upon the court's finding that "he was under a duty and opportunity to speak and he knew or had reason to

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(N. D. 1803); 2 PARSONS ON NOTES AND BILLS (1873) 593; Forsyth v. Day, 46 Me. 176 (1858); Lancaster v. Ballzell, 7 Gill & Johns. 463 (Md. 1836).

79. Fall River National Bank v. Buffinton, 97 Mass. 498 (1867); Casco Bank v. Keene, 53 Me. 103 (1865).

80. For collection of cases, see note (1912) 36 L. R. A. (N.S.) 1007. "An estoppel may be limited to the person acting upon it and to the subject matter to which it relates; but it cannot be apportioned." Casco Bank v. Bank of Keene, 53 Me. 103 (1865). With regard to estoppel by failure to repudiate, see Traders' Nat. Bank v. Rogers, 167 Mass. 315, 45 N. E. 923 (1897).

81. The drawee is no less worthy of protection than a bona fide purchaser.

82. At least if there was an express adoption. Reichsgericht, June 3, 1913, 82 R.G. 337. This attitude is not surprising since the German law has no consideration dogma. If the purported indorser merely failed to repudiate his signature, he is only liable for reliance damages. Reichsgericht, November 25, 1927, 57 JURISTISCHE WOCHENSCHRIFT (1928) 396.

83. (1912) 36 L. R. A. (N.S.) 1007.

84. *Id.*, at 1006, 1112. The arguments which are usually advanced individually or in combination against the recognition of such a pure ratification are: (1) To admit the binding effect of an act constituting the crime of forgery would be against public policy. (2) Since a forger, unlike an unauthorized agent, did not purport to act on behalf of the person whose signature has been forged, there was no basis for a ratification. (3) The contract of the forger being void, ratification amounted to a new contract which was unenforceable without a new consideration. Shisler v. Vandike, 92 Pa. 447 (1880); *cf.* Workmen v. Wright, 33 Ohio St. 405 (1878); Catskill National Bank v. Lasker, 161 App. Div. 548, 151 N. Y. Supp. 191 (1915); Brook v. Brook (1871) L. R. 6 Ex. 89. *Contra*: Greenfield Bank v. Crafts, 4 Allen 447 (Mass. 1862). As to the requisites of ratification, see Traders National Bank v. Rogers, 167 Mass. 315, 45 N. E. 923 (1897).

know that the holder would rely on his silence and would be injured thereby."<sup>85</sup>

Where the issue is that of the title of the ostensible indorser rather than of his liability, some of the cases on the point have denied the true owner recovery from an innocent purchaser who collected the proceeds,<sup>86</sup> or from the drawee bank which paid the check,<sup>87</sup> if the owner's silence or failure to give timely notice has prevented those parties from getting compensation from a forger who was still solvent at the time notice should have been given.<sup>88</sup>

The foregoing "ratification" cases present additional problems. Let us suppose that a subsequent purchaser, instead of suing the impecunious payee on his ratified indorsement, sues the acceptor or, in case of dishonor, the drawer. Can the purchaser meet the forgery defense by pleading that the payee is precluded from setting it up and that the acceptor or payee are therefore similarly precluded? This question is of vital concern to all the parties. An answer in the affirmative enables the purchaser to collect an otherwise uncollectible debt. Acceptor and drawer, on the other hand, have to be protected against the danger of double liability, for a judgment against them in favor of the innocent purchaser based on the payee's assumed ratification is not *res judicata* in a subsequent suit by the true owner against them. Since the forgery defense is given to parties prior to the forgery as an absolute defense to protect them against the danger of double payment, it can be taken away only

85. Cf. *Shinew v. First Nat. Bank of Bowling Green*, 84 Ohio St. 297, 97 N. E. 881 (1911); *First Nat. Bank of Union Bridge v. Wolfe*, 140 Md. 479, 117 Atl. 898 (1922); *Boone v. Citizens Bank & Trust Co.*, 290 S. W. 39 (Tenn. 1927); *Corser v. Parsh*, 41 N. H. 24 (1860); *McKenzie v. British Linen Co.*, 6 A. C. 82 (Ex. 1881). For collection of cases, see note (1923) 25 A. L. R. 177.

86. *Brown v. Peoples National Bank*, 170 Mich. 417, 136 N. W. 506 (1912); *EWART ON ESTOPPEL* (1900) 135, 136. *Contra*: *Independent Oil Men's Association v. Fort Dearborn Nat. Bank*, 311 Ill. 278, 142 N. E. 458 (1924); see *Stern v. President and Directors of Manhattan Co.*, 134 Misc. Rep. 351, 235 N. Y. Supp. 634 (1929); cf. *Hamlin v. Sears*, 82 N. Y. 327 (1881).

87. *State v. First National Bank of Montrose*, 203 Pa. 69, 52 Atl. 13 (1902); *Marks v. Anchor Savings Bank*, 252 Pa. 304, 97 Atl. 392 (1910) (certified check and therefore no problem of lack of privity); *Annett v. Chase Nat. Bank*, 196 App. Div. 632, 188 N. Y. Supp. 7 (1921); (1921) 21 COL. L. REV. 703. *Contra*: *Stern v. President and Directors of Manhattan Co.*, 134 Misc. 551, 235 N. Y. Supp. 634 (1929). It is interesting that *CHITTY ON BILLS* (1799), citing *Mains and Pothier*, advises the holder to notify the acceptor immediately of a loss of the instrument without elaborating the consequences of the holder's failure to do so. In later editions this passage has been omitted.

88. If, however, the true owner's laches have caused no prejudice to the subsequent purchaser or to the drawee, courts have usually allowed the true owner to recover. *Blum v. Whipple*, 194 Mass. 253, 80 N. E. 501 (1907) (subsequent purchaser, more than two years delay between discovery of the forgery and notification); *Lindenthal v. Northwest State Bank*, 221 Ill. App. 145 (1921) (drawee). *Contra*: *Annett v. Chase Nat. Bank*, 196 App. Div. 632, 188 N. Y. Supp. 7 (1921).

if they are safeguarded against this danger. The problem is, however, largely solved by the modern statutory interpleader provisions, both state and federal, under which the acceptor or drawer may be able to interplead the "true owner" in the state court where the suit is pending, if the latter is subject to the jurisdiction of that court,<sup>89</sup> or in the competent federal court.<sup>90</sup> In so far as those parties are protected by such statutory provisions, there seems to be no reason for denying an absolute effect to a ratification. The right of interpleader is of equal importance to the acceptor or drawee who has not yet paid the subsequent purchaser and is sued by the true owner, in our case, the payee, rather than by the subsequent purchaser.

Another problem in these cases arises where the indorsee in our illustration, with respect to whom the purported indorser would be estopped to deny the genuineness of his signature, forces a party subsequent to the forgery to take up the instrument. Can the latter sue either the purported indorser or a prior party and plead ratification? Doctrinal difficulties to this possibility are presented by the theory that a party secondarily liable who pays an instrument does not enjoy the rights of the last holder but is merely remitted to his former rights as regards all prior parties.<sup>91</sup>

Until now we have investigated only the results of the true owner's ratification or failure to give notice of a discovered forgery to all parties concerned. This problem, however, does not only concern the true owner. A subsequent purchaser may fail to notify prior secondary parties, the drawer may fail to notify the drawee, or the drawee may fail to notify the recipient. There are not many cases discussing the "duty" of a subsequent purchaser to notify prior parties of a discovered forgery. Still, we have the interesting case of *Rick v. Kelley*<sup>92</sup> in which the Pennsylvania Supreme Court required the purchaser of a note to give notice of the forgery within reasonable time after its discovery "unless the note be shown to possess no value." In contrast to this scarcity of decisions discussing the purchaser's duty of notification there are quite a few cases involving the duty of the drawer of a check to notify the drawee bank of a discovered forgery of the payee's signature. Has the drawer forfeited by his laches his right against the drawee bank which paid his check to demand that his account be recredited? The courts have answered in the affirmative, relying upon the duty imposed by the customer-bank relationship, the majority of them, however, only where the delay has

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89. See, e.g., N. Y. C. P. A., §§ 285-287.

90. An Act to Amend Section 24 of the Judicial Code by Conferring on district courts additional jurisdiction of Bills of Interpleader and of Bills in the nature of Interpleader. 28 U. S. C. A., § 41 (24).

91. NEGOTIABLE INSTRUMENTS LAW, § 121.

92. 30 Pa. 527 (1858).

been prejudicial to the bank.<sup>93</sup> Likewise, the drawee has been denied recovery from the recipient where his laches have been prejudicial to the latter.<sup>94</sup>

*Failure to discover a forgery by lack of supervision of agents handling negotiable instruments.* We now come to the third behavior type mentioned. This appears to present the weakest case against the true owner. It is tied up with the question of the liability of the principal for the acts of his agent, and since it is of practical importance to all business concerns, considerations of business practice become of vital significance in these cases. Frequently the drawer or the true owner, for instance, the payee, of a negotiable instrument enables the forgery of an indorsement by lack of due care, particularly by lack of efficient supervising of his employees. Very often the fabrication of a whole series of forgeries by an employee over a period of years<sup>95</sup> was possible only because either the drawer or the true owner, as the case may have been, did not use an efficient system of control over what happened to negotiable instruments either drawn or received. In situations of this kind, the courts have gone to extremes in adhering to the old rule protecting the true owner or the drawer, with the result that employers have had no incentive to build up an effective system of control over their employees.

In *Shephard and Morse Lumber Co. v. Eldridge*,<sup>96</sup> a creditor who had received from his debtor two checks in payment of a debt sued the

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93. See, e.g., *Houseman-Spitzley Corp. v. American State Bank, et al.*, 205 Mich. 268, 171 N. W. 543 (1919); *National Surety Co. v. President and Directors of Manhattan Co.*, 252 N. Y. 247, 169 N. E. 372 (1929). The Pennsylvania rule is *contra*. *McNeely v. Bank of North America*, 221 Pa. 588, 70 Atl. 891 (delay of three months); *Connors v. Old Forge Discount & Deposit Bank*, 245 Pa. 97, 91 Atl. 210 (1914) (notice given 43 days after discovery, damage not in issue). If the forgery has been committed by the servant of the drawer, the servant's knowledge is not imputable to the drawer-principal, since the agent is acting in his own interest. *United Security Life Ins. & Trust Co. of Pennsylvania v. Central Nat. Bank of Philadelphia*, 185 Pa. 586, 40 Atl. 97 (1898).

94. *Merchants National Bank v. Federal State Bank*, 206 Mich. 8, 117 N. W. 390 (1919); see *Yatesville Banking Co. v. Fourth National Bank*, 10 Ga. App. 1, 72 S. E. 528 (1911). The drawee is required to give notice with reasonable promptness. *National Exchange Bank of Providence v. United States*, 151 Fed. 402 (C. C. A. 1st, 1907). The diligence required in giving such a notice is not the same as that called for in the giving of a notice of dishonor. *Canal Bank v. Bank of Albany*, 1 Hill 287 (N. Y. 1841); *Schroeder v. Harvey*, 75 Ill. 638 (1874). The English law is apparently stricter. *London & River Plate Bank v. Bank of Liverpool*, 1 Q. B. 7 (1896); cf. *Cocks v. Masterman*, 9 B. & C. 902 (K. B. 1829). Section 50(3) of the Canadian Bills of Exchange Act expressly permits the drawee and all parties subsequent to the forgery to recover if notice of the forgery be given within a reasonable time after knowledge of the forgery has been acquired.

95. See *infra*, page 889.

96. 171 Mass. 516 (1898).

latter for the amount of the original indebtedness, the checks having been embezzled by a dishonest employee who had converted the proceeds to his own use. The drawer's defense was that the plaintiff had intrusted the checks to a clerk who, a proper examination of the books would have revealed, was dishonest, and had thus given the clerk an opportunity to forge the payee's signature. This defense was unsuccessful,<sup>97</sup> the court saying:

"We are of opinion that the holder of an unindorsed check, payable to his own order, is under no legal obligation to the drawer to exercise care as to how the check shall be kept, or to whom he shall commit its custody, or to see to it that the check shall not be put in circulation by the forgery of his indorsement, so long as he acts honestly without collusion. Such a holder is not deprived of his remedy against the drawer by merely negligently intrusting such a check to a clerk who, due care would have told him, was dishonest, and thus giving the clerk an opportunity to commit crime. He has the right to assume that his clerk will not commit a crime, and to rest upon the presumption that he has not stolen or forged, and will not do so, and he is under no legal obligation, either to the drawer of the check or to the public, to see to it that the check is not put in circulation with a forged indorsement."<sup>98</sup>

The court apparently felt that this result was not too harsh on the defendant because the latter could demand from the solvent drawee-bank that his account be recredited.<sup>99</sup> When the issue has been one of the true owner's title rather than his liability, bona fide purchasers have been equally unsuccessful with such a defense when sued by the true owner in conversion.<sup>100</sup>

More frequently presented to the courts in recent years has been the problem of whether the drawer of a check is under obligation to the drawee-bank or to the public to prevent his checks from being put in circulation with forged indorsements. Do we find the attitudes of the courts here the same as in the cases involving the payee? These are the typical circumstances in which the problem most often arises. In

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97. The drawer, however, is discharged if the check was received by an agent of the payee who had authority to receive though not to cash checks. *Mills v. Hurley Hardware & Furniture Co.*, 129 Ark. 350, 196 S. W. 121 (1917); *Burstein v. Sullivan*, 134 App. Div. 623, 119 N. Y. Supp. 317 (2d Dep't 1909); *MacFadden v. Follrath*, 114 Minn. 85 N. E. (1911); *Louisville & Nashville Ry. v. Citizens & People's Nat. Bank of Pensacola*, 74 Fla. 385, 77 So. 164 (1917).

98. *Shephard and Morse Lumber Co. v. Eldridge*, 171 Mass. 516, at 528 (1893).  
99. *Id.*, at 519.

100. *Patent Safety Gun Cotton Co. v. Wilson*, 49 L. J. Q. B. (N.S.) 713 (1830); *First Nat. Bank of Montgomery v. Montgomery Mfg. Co.*, 211 Ala. 551, 101 So. 186 (1924). But see *General Cigar Co. v. First Nat. Bank of Portland*, 290 Fed. 143 (C. C. A. 9th, 1923). As to the defense of contributory negligence, see *Shephard and Morse Lumber Co. v. Eldridge*, 171 Mass. 516, 527 (1893).

pursuance of a scheme to defraud his employer a dishonest employee, who was in charge of preparing checks for payments, made out checks to fictitious creditors, presented them to an officer of the employer who signed them without checking their correctness, and, after having forged the signature of the purported payees, cashed them with his bank. The drawee-bank charged the drawer's account with the amounts paid to the collecting bank, and the drawer received with the monthly statement the checks bearing the forged indorsements. Very often such a scheme would be continued for years and would involve large amounts, because a comparison of the vouchers with the check register showed no irregularities, and no additional check up was made on the seemingly trustworthy employee. When finally the scheme broke down and the forgeries were discovered, the drawer demanded from the drawee-bank that his account be recredited with the amounts paid on the forged checks, a demand which was regularly refused. These were the regular lines of defense taken by the drawee-bank: That an account stated between the bank and its depositor barred a recovery; that the drawee-bank was protected, because the checks, having been made payable to fictitious payees, were payable to bearer; that the depositor's negligence estopped him from making the claim, since that negligence had caused damage to the drawee-bank which acted in reliance.<sup>101</sup>

It is impossible to give an exhaustive history of the struggle between drawee-bank and drawer-depositor. Only its more important phases can be reported.<sup>102</sup> The first line of defense has broken down completely. Courts have generally taken the view that since a depositor accepted the accounts in ignorance of the frauds perpetrated upon him, he accepted them as correct under the mistake of fact and was therefore not bound by the account stated.<sup>103</sup> The customer has also been successful on two other strategic points. He has been able to convince a considerable body of authorities that the checks made payable to fictitious *creditors* were not payable to *fictitious payees* and could, therefore, not be paid by the drawee-bank with impunity as bearer checks. These courts have argued that the drawer did not know the payees to be fictitious and did not intend to make the checks payable to fictitious persons, that, on the contrary, he believed in good faith that the names of the payees represented real persons entitled to receive from him the amounts designated

101. *Welsh v. German-American Bank*, 73 N. Y. 424 (1878); *National Surety Co. v. President and Directors of Manhattan Co.*, 252 N. Y. 247, 169 N. E. 372 (1929); *Detroit Piston Ring Co. v. Wayne County and Home Savings Bank*, 252 Mich. 163, 233 N. W. 185 (1930); *Los Angeles Investment Co. v. Home Savings Bank*, 180 Cal. 601, 182 Pac. 293 (1919).

102. For collection of cases, see (1935) 99 A. L. R. 426, at 439.

103. *Los Angeles Investment Co. v. Home Savings Bank*, 180 Cal. 601, 182 Pac. 293 (1919); *National Surety Co. v. President and Directors of Manhattan Co.*, and *Detroit Piston Ring Co. v. Wayne County and Home Savings Bank*, both cited *supra*, note 101.



by the checks. The knowledge of the dishonest agent has generally been regarded as irrelevant, since he was not acting within the scope of his employment in carrying out a scheme of fraud upon the drawer.<sup>104</sup> But in a few jurisdictions, the knowledge of the servant or agent of the fictitious character of the payee has been, by statutory provision, imputed to the drawer principal.<sup>105</sup> Furthermore, the preponderant majority of courts have held that the customer is under no duty to his bank upon the return of the vouchers to ascertain the genuineness of indorsements on checks drawn by him. He cannot be expected to know even the signature of the payee. His duty to examine his pass book and the returned vouchers and to compare them with the check register is limited to ascertaining the genuineness of his own signature and the amount paid.<sup>106</sup> The customer has a right "to assume that the bank before paying his check will ascertain the genuineness of the indorsements."<sup>107</sup>

104. *Welsh v. German-American Bank*, 73 N. Y. 424 (1878); *Shipman v. Bank of State of New York*, 126 N. Y. 318 (1891); *Jordan Marsh Co. v. National Shawmut Bank*, 201 Mass. 397, 87 N. E. 740 (1909); *American Sash and Door Co. v. Commercial Trust Co.*, 56 S. W. (2d) 1034, (Mo. Sup. Ct. 1932); *United States Cold Storage Co. v. Central Manufacturing District Co.*, 343 Ill. 503, 175 N. E. 825 (1931), (1936) 9 So. CAL. L. REV. 397, (1927) 27 ILL. L. REV. 65; *Los Angeles Investment Co. v. House Savings Bank*, 180 Cal. 601, 182 Pac. 293 (1919). NEGOTIABLE INSTRUMENTS LAW § 9(3). A different result has, however, been reached if the dishonest employee drew the check himself and had authority to do so. *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 35 N. E. 982 (1894); *Snyder v. Corn Exchange Bank*, 221 Pa. 599, 70 Atl. 876 (1903). As to the interpretation of BILLS OF EXCHANGE ACT § 7, see BYLES ON BILLS (19th ed. 1931) 84. See in general, Kulp, *The Fictitious Payee* (1920) 18 MICH. L. REV. 296; Thayer, *Fictitious Payees in Bills of Exchange: A Comparative Study* (1937) 25 KY. L. J. 203.

105. ILL. REV. STAT. (SMITH-HURD, 1935) c. 98, § 29 (3), which was passed at the instance of the American Banking Association; IDAHO CODE ANN. (1932) § 26-109 (3); MONT. REV. CODES ANN. (ANDERSON & MCFARLAND, 1935) § 8416 (3).

106. Concerning the depositor's duties in this respect, see the cases collected in (1921) 15 A. L. R. 159, (1930) 67 A. L. R. 1121; Arant, *Forged Checks—The Duty of the Depositor to His Bank* (1922) 31 YALE L. J. 598.

107. *Welsh v. German-American Bank*, 73 N. Y. 424 (1878); *National Surety Co. v. President and Directors of Manhattan Co.*, 252 N. Y. 247, 169 N. E. 372 (1929); *American Exchange Nat. Bank v. Yorkville Bank of New York*, 122 Misc. 616, 204 N. Y. Supp. 621 (Sup. Ct. 1924), *aff'd*, 210 App. Div. 885, 206 N. Y. Supp. 879 (1925); *Maryland Casualty Co. v. Chase Nat. Bank*, 153 Misc. 538, 275 N. Y. Supp. 311 (Sup. Ct. 1934); *DeWolf v. Foreman National Bank*, 264 Ill. App. 23 (1931); *Guardian Savings and Loan Association v. Liberty State Bank*, 60 S. W. 823 (Tex. Civ. App. 1933). But see *Union Tool Co. v. Farmers and Merchants National Bank of Los Angeles*, 192 Cal. 40, 218 Pac. 424 (1923) where the court said by way of dictum that the depositor is under a duty to ascertain the genuineness of indorsements. But in this case there was "an agreement with depositor" in the bank's passbook which required him to examine both the face and the indorsements of returned checks. The dishonest employee had presented forged freight bills to the employer and prepared checks payable to "Mueller, Agent, Pacific Railroad," erased the name of the railroad from the check, forged the indorsement of Mueller, and cashed the checks. The court

For the same reason courts have generally declined to apply to cases of forged indorsements statutory provisions providing a time limit for a customer's recovery against his bank on forged or raised checks and have limited the application of such a provision to a forgery of the drawer-customer's signature.<sup>108</sup>

Although it is a pure fiction to assume that the drawee-bank has better means of ascertaining the genuineness of indorsements than the drawer, there is no reason to quarrel with the application of the rule in cases where the comparison of the pass- or check-book, or the check stubs, with the vouchers did not disclose forged indorsements because there was no discrepancy between them; in situations of this kind the rule is good policy because it forces banks not to cash, and the drawee-bank in particular not to pay, checks to strangers but only to reliable customers or another bank and only after having secured a guarantee of the genuineness of prior indorsements.<sup>109</sup> But should this rule also be applied in situations where an examination of the vouchers could have disclosed the forgery because the dishonest employee, after having forged the payee's signature, had indorsed the checks in his own name?<sup>110</sup> And—what is more important—should the rule be applied even in situations where the drawer could have discovered and prevented a whole series of forgeries committed over an extended period by examining the correctness of checks prepared by his employee, by comparing the vouchers, as to amount and payees, with books and other records kept in the office? Should not the drawee-bank, in situations of this kind, be allowed to debit the drawer's account with at least the amount of those checks of the whole series which were forged after the forgery of the

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held that the plaintiff's negligence in not ascertaining the genuineness of the indorsement was offset by the negligence of the banks, which had a similar duty.

108. *Kleinman v. Chase National Bank v. City of New York*, 124 Misc. 173, 207 N. Y. Supp. 191 (Sup. Ct. 1925); (1925) 38 HARV. L. REV. 679; (1925) 25 COL. L. REV. 668 (the drawees notified the drawee-bank two years after he had received the statement of account and the vouchers covering this transaction). *Atwell v. Mercantile Trust Co. of Calif.*, 95 Cal. App. 338 (1928), (1929) 17 CALIF. L. REV. 308, 2 So. CALIF. L. REV. 387. For further references see BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* (5th ed. 1932) 1098. *Contra*: *Union Tool Co. v. the Farmers and Merchants National Bank of Los Angeles*, 192 Cal. 40, 218 Pac. 424 (1923); but *cf.* *Merchants National Bank of Los Angeles v. Continental Bank*, 98 Cal. App. 523, 277 Pac. 354 (1929).

109. *Shipman v. Bank of State of New York*, 126 N. Y. 318, 27 N. E. 371; BRADY ON BANK CHECKS (2d ed. 1929).

110. The court in *National Surety Co. v. President and Directors of Manhattan Co.* [252 N. Y. 247, 169 N. E. 372 (1929)] apparently considered this circumstance as irrelevant. But see *Prudential Insurance Co. of America v. National Bank of Commerce in New York*, 227 N. Y. 510, 125 N. E. 681 (1920); *Pannonia Building & Loan Association v. West Side Trust Co.*, 93 N. J. L. 377, 108 Atl. 240 (1919).

prior checks could have been discovered? The courts have given no uniform answer.<sup>111</sup>

The New York courts and many others following their example have carried far the principle that the drawer-customer has a right to assume that the drawee-bank, before paying, will ascertain the genuineness of indorsements. They have allowed the drawer to rely on the honesty and faithfulness of his employees, provided the latter had given no reason for suspicion, and they have not regarded the drawer's failure to check the correctness of the checks as negligent;<sup>112</sup> in jurisdictions taking this view efforts of the defendant bank to get to the jury the question of the plaintiff's negligence have been unsuccessful, for these courts have been inclined to direct the verdict in the plaintiff's favor.<sup>113</sup> Even where the drawer's blind confidence had to be called negligence, some courts have still allowed recovery because they did not regard this negligence as the proximate cause of the drawee-bank's loss.<sup>114</sup> Their reaction, however, has been different in instances where the defendant was able to fortify his defense by alleging and proving that the drawer had reason for not trusting his employee.

The play of rule and counterrule is well illustrated by the decision of the Michigan Supreme Court in *Detroit Piston Ring Company v. Wayne County and Home Savings Bank*. Here, a dishonest payroll clerk of the drawer, a manufacturing corporation of some size, had inserted on the payroll the names of former employees and fictitious names, prepared checks to their order, and presented them to one of the officials of the corporation who signed them without examination of their correctness. After having forged the indorsements of the purported payees, she cashed these spurious checks, which were marked as payroll checks, with another bank and continued this scheme for a period of more than two and one-half years, forging some 570 checks for about \$28,000. To cover up the fraud, the dishonest employee increased the company's cost account. Since this increase in the cost of production could not be accounted

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111. (1935) 99 A. L. R. 426, 439; Comment (1935) 33 MICH. L. REV. 758.

112. *Welsh v. German-American Bank*, 73 N. Y. 424 (1878); *Shipman v. Bank of State of New York*, 126 N. Y. 318, 27 N. E. 371 (1891); *Detroit Piston Ring Co. v. Wayne County and Home Savings Bank*, 252 Mich. 163, 233 N. W. 185 (1930); *Marsh Co. v. Shawmut Bank*, 201 Mass. 397, 87 N. E. 740 (1909).

113. *Welsh v. German-American Bank*, 10 J. & S. 462, *aff'd*, 73 N. Y. 424 (1878); *Detroit Piston Ring Co. v. Wayne County and Home Savings Bank*, 252 Mich. 163, 233 N. W. 185 (1930). *Contra*: *Fletcher National Bank v. Crescent Paper Co.*, 193 Ind. 329, 139 N. E. 664 (1923). Here the court held that it was for the jury to determine whether or not the depositor was negligent in failing to examine indorsements where the checks were drawn by a clerk to fictitious payees, or to a person to whom the depositor was not indebted and with whom he had done no business for eight months. See also, *Kaszab v. Greenebaum Bank & T. Co.*, 252 Ill. App. 107 (1929).

114. *Los Angeles Ins. Co. v. House Savings Bank*, 180 Cal. 601, 182 Pac. 293 (1919); *Marsh Co. v. Shawmut Nat. Bank*, 201 Mass. 397, 87 N. E. 740 (1909).

for, auditors were employed, but no audit was made of the payroll, and the irregularities were not detected. If the exact working time of each employee had been ascertained by comparing the payroll with the employee's time card, the fraud would have been discovered immediately. It was finally discovered in this manner. In the suit by the drawer against his bank to recredit his account, the Michigan Supreme Court denied that the company had an absolute duty to compare the returned checks with the employment or time cards.<sup>115</sup> The officers of the company were said to have a right to rely upon the honesty and faithfulness of the clerk whom they had no reason to suspect of dishonesty. But the court conceded that as soon as the knowledge of the increased cost of production was brought home to the management due care might have required the type of comparison that was eventually made, and, therefore, reversing a judgment based on a directed verdict in plaintiff's favor, granted a new trial.

A similar attitude was taken by the New York Court of Appeals in *Prudential Insurance Co. v. National Bank of Commerce*, a case involving the applicability of the rule to another typical situation.<sup>116</sup> In this case the plaintiff insurance company drew two checks upon the defendant bank payable to two policy holders and sent them to the plaintiff's agent for delivery to the payees. The plaintiff knew that previous checks sent to the agent had not been received by the payees. The agent forged the indorsements of the payees, indorsing his own name, deposited the checks in a bank which collected them from the defendant, and the agent converted the proceeds. The trial court directed a verdict for the plaintiff, but this was reversed because evidence should have been submitted to the jury on the issue of whether the plaintiff was precluded from setting up the forgeries by reason of its negligence in not discovering the agent's prior misconduct or informing the defendant of reasons for special caution.

In order to prevent forgeries of pay checks, so frequent a practice in recent years, some business enterprises and their banks have resorted to a system of self-protection. Payroll checks were designed which were not only marked on their face as such, but bore in addition the time clock number of the employees, indicating the number of working hours of each employee. But, despite these precautions, many of these payroll checks bore forged indorsements and were paid by the drawee-bank. Must the bank still bear the loss or can it rely on the apparent regularity of these payroll checks? In *Ericson Co. v. Iowa National Bank*, the Iowa

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115. *Detroit Piston Ring Co. v. Wayne County and Home Savings Bank*, 252 Mich. 163, 233 N. W. 185 (1930). The court cited as an authority: *Paton v. Guaranty Trust Co.*, 227 App. Div. 545, 238 N. Y. Supp. 362 (1930); cf. *National Bank of Commerce of Tacoma v. Tacoma Mill Co.*, 182 Fed. 1, 12 (C. C. A. 9th, 1910).

116. 227 N. Y. 510, 125 N. E. 681 (1920).

Supreme Court has answered this question in favor of the bank.<sup>117</sup> In this case the protective scheme broke down because the checks, prepared by a dishonest employee as payable to former employees, were signed by an officer of the plaintiff, who blindly relying on the employee's honesty, did nothing to check the accuracy of the prepared checks. "These representations of fact made on the face of the check," the court held, "might reasonably be relied upon by the drawee, and, if, when so relied on, they reasonably tended to relax further investigation on the part of the drawee for its own protection, then he worked an estoppel against the plaintiff." The court further argued that "if the drawee-bank, in paying the check, reasonably believed that the payee was a present employee, it might also reasonably believe that the indorsement was genuine."<sup>118</sup>

Looking back, we find that, at least on the surface, the drawee-bank has generally received a rough deal at the hands of the courts. But is this really true? In many of the cases there are indications that one of the reasons why the courts did not hesitate to allow recovery from the bank was that the customer's behavior had caused no damages to the drawee-bank, since the latter had a remedy over against the recipient.<sup>119</sup> Therefore, to understand the attitude of the courts fully, we should take into account the fact that the liability of the drawee-bank to its depositors is closely tied up with the liability of the recipient to the drawee-bank. This leads us to a more detailed investigation of the relationship between the drawee-bank and the recipient.

In suits by the drawee-bank against the recipient, the problem of the relevancy of the negligence of the drawer-depositor in facilitating the forgery by non-discovery has played an important role. The recurrent defense of the recipient has been that in such a situation the drawee-bank, due to the drawer's negligence, is under no duty to recredit his account and that, therefore, the drawee ought not to have the equitable action for money had and received against the recipient. This defense has generally been refused. The courts have relied on the argument that there is no privity between drawer and collecting bank and that, therefore, the drawer owed to that bank no duty of vigilance.<sup>120</sup> This position has been

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117. 211 Iowa 495, 230 N. W. 342 (1931). A further additional factor in favor of the drawee bank was that the protection of an insurance carried by it to cover such losses had been lost by the delay in discovery. See further *Defiance Lumber Co. v. Bank of California*, 180 Wash. 533, 41 P. (2d) 135 (1935); *Thomas v. Standard Accident Insurance Co. of Detroit*, 7 Fed. Supp. 205 (E. D. Mich. 1934). But cf. *City of New York v. Bronx County Dress Co.*, 261 N. Y. 64, 184 N. E. 495 (1933), (1933) 11 N. Y. U. L. Q. REV. 101.

118. This argument has been criticized in *American Sash & Door Co. v. Commerce Trust Co.*, 56 S. W. (2d) 1034 (Mo. 1932).

119. *Infra*, note 121.

120. *National Surety Co. v. President and Directors of Manhattan Co.*, 252 N. Y. 247, 169 N. E. 372 (1929); *American Exchange National Bank v. Yorkville Bank*,

fortified by resorting to the picture that "the collecting bank, in taking and collecting checks from the drawee-bank, relies not on anything done by the drawer but solely on the credit and the responsibility of the prior indorser;" a few courts have even moved in a circle, arguing that despite the drawer-depositor's negligence, the drawee-bank was still liable to the drawer-depositor since it had suffered no damage by the latter's negligence, inasmuch as the drawee-bank had a remedy over against the recipient.<sup>121</sup> The policy behind the numerous decisions on this point is quite clear: The courts want to force every indorser to fall back on his predecessor "until the wrongdoer is finally made to pay."<sup>122</sup> It is, therefore, not surprising that the efforts of the recipient to compel the drawee-bank to interpose the defense of negligence in a suit by the drawer against the drawee-bank have been without success; the drawee-bank has been allowed to forego this defense either because it believed no such defense existed, or because it wished to waive it and rely on the remedy over against the recipient.<sup>123</sup> An interesting illustration of such a case is *Sprague v. West Hudson County Trust Co.*<sup>124</sup> Here a check bearing the forged indorsement of the payee was paid by the drawee-bank to the recipient. On discovery the latter filed a bill in equity against the drawee praying that it be enjoined from crediting the account of the drawer "until a court of competent jurisdiction has determined that the defendant bank is legally liable." The petition was based on the fact that the forgeries had been committed by employees of the drawer and could have been stopped long before the petitioner cashed the checks by ordinary diligence in inspecting the returned vouchers and bank statements. But the petition was denied because there was no privity between drawer and recipient and, therefore, no duty of care owed by the latter to the former. Whether the court meant that a drawer did not owe a duty of care to a recipient in every case is difficult to say, since the petitioners themselves, who had cashed the instruments under somewhat peculiar cir-

122 Misc. 616, 204 N. Y. Supp. 621, *aff'd*, 206 N. Y. Supp. 679 (Sup. Ct. 1924); *Fallick v. Amalgamated Bank of New York*, 232 App. Div. 127, 249 N. Y. Supp. 238 (1st Dep't 1931); *Second National Bank of Pittsburg v. Guaranty Saving and Deposit Co. of Shamokin*, 206 Pa. 616, 56 Atl. 72 (1903).

121. *American Exchange National Bank v. Yorkville Bank*, 122 Misc. 616, 214 N. Y. Supp. 621 (1924), *aff'd*, 216 N. Y. Supp. 679 (Sup. Ct. 1924); *cf.* *Critten v. Chemical Bank*, 171 N. Y. 219, 63 N. E. 969 (1902); *Kearny v. Metropolitan Bank*, 110 App. Div. 236, 97 N. Y. Supp. 274 (1st Dep't 1905), *aff'd*, 186 N. Y. 611, 79 N. E. 1108 (1906). In many cases the collecting bank had given a guarantee of prior indorsements.

122. *Manufacturers Trust Co. v. Harriman National Bank & Trust Co.*, 146 Misc. 551, 262 N. Y. Supp. 482 (Sup. Ct. 1932).

123. *Fallick v. Amalgamated Bank of New York*, 232 App. Div. 127, 249 N. Y. Supp. 238 (1st Dep't 1931).

124. 92 N. J. Eq. 638 (1921).

cumstances, were apparently not free from blame. Under these decisions the drawee-bank seems to be safe in recrediting voluntarily the drawer's account on the latter's sufficient showing of the forgery of an indorsement and in relying on its remedy over against the recipient, at least if the latter has given a guarantee of the genuineness of all prior indorsements.

These decisions, particularly those rendered by New York courts, which fail to impose on the drawer a duty of guarding a subsequent purchaser against the danger of a forgery of the payee's signature, are in accord with a line of decisions which deny that the drawer or indorser owes to a subsequent purchaser a duty of care to protect him against wrongful filling of blank spaces.<sup>125</sup> Yet even the New York courts could have decided in favor of subsequent purchasers, as some of the negligent mailing and imposter cases show. *Slattery and Co. v. City Bank* is particularly interesting in this respect.<sup>126</sup> Here a New York brokerage firm drew a check payable to one H. E. Roberts, intending to mail the same to its client by that name in Oklahoma, but instead sent it by mistake to a former client of the same name in Texas. The latter cashed it in a Texas bank which in turn discounted it with the defendant bank. The defendant bank collected the check from the drawee-bank. The plaintiff drawer, as assignee of the true payee, sued the defendant bank for conversion. The court could have seized upon the argument that because of the lack of privity the drawer of a negotiable instrument has no duty of care to a subsequent purchaser. Or it could have treated the indorsement as a forgery and invoked the doctrine of *Mead v. Young* since the recipient knew that he was not the intended payee.<sup>127</sup> Instead of so arguing, the court denied that there was

125. *National Exchange Bank v. Lester*, 194 N. Y. 461, 87 N. E. 779 (1909) (accommodation indorser); *Exchange National Bank of Spokane v. Bank of Little Rock*, 58 Fed. 140 (C. C. A. 8th, 1893); *Burrows v. Klunk*, 70 Md. 451, 17 Atl. 378 (1889); cf. *Greenfield Savings Bank v. Stowell*, 123 Mass. 196 (1895) (maker). *Contra*: *Hackett v. First National Bank of Louisville*, 114 Ky. 193, 70 S. W. 660 (1902); *Yokum v. Smith*, 63 Ill. 321 (1872). More than a few courts distinguish between the status of a bona fide purchaser and that of a drawee-bank, and allow the drawee-bank to debit the negligent drawer's account with the raised amount. *Timble v. Garfield Bank*, 121 App. Div. 870, 106 N. Y. Supp. 497 (1907). See (1919) 4 Conn. L. Q. 46; (1918) 31 HARV. L. REV. 779.

126. 114 Misc. 48, 186 N. Y. Supp. 679 (1920), adversely criticized in (1921) 21 COL. L. REV. 576; (1921) 30 YALE L. J. 628. And cf. *Market St. Title and Trust Co. v. Chelton Trust Co.*, 296 Pa. 230, 145 Atl. 844 (1929); (1924) 77 U. OF PA. L. REV. 1115. *Contra*: *Thomas v. First National Bank of Gulfport*, 101 Miss. 500, 58 So. 478 (1911); *Jones Bros. v. Citizens National Bank of Ogmulgee*, 106 Okla. 162, 233 Pac. 472 (1923); *Beattie v. National Bank of Illinois*, 174 Ill. 571, 51 N. E. 602 (1898).

127. *Russell v. First National Bank*, 2 Ala. App. 342, 56 So. 863 (1911); *Beatty v. National Bank of Illinois*, 174 Ill. 571, 51 N. E. 602 (1898). The court could also

a forgery because the drawer's original intent to make the check payable to the Oklahoma Richards "was superseded and blotted out by the actual delivery" to the Texas Richards. Furthermore, recognizing a duty of care owed by the drawer to a subsequent purchaser, the court held that the loss should fall upon the plaintiff through whose fault it occurred rather than on the defendant who parted with money in good faith.<sup>128</sup>

A similar approach has frequently been taken in the imposter situation, *i.e.*, cases where an imposter, representing that he is a certain person, fraudulently obtains an instrument made payable to the person who he purports to be, and indorses the instrument with an assumed name. In this situation courts have frequently refused to regard the indorsement of an imposter as a forgery because—as they said—the drawer actually intended the imposter to acquire title to the instrument and to indorse and collect it. They have thus implicitly recognized a duty of care on the part of the drawer with respect to subsequent purchasers and the drawee bank. As a result, the title of the subsequent purchaser has been recognized and the drawee-bank has not been held liable to pay back the proceeds and has been allowed to debit the drawer's account.<sup>129</sup> These cases show that it is not the lack of privity which prevented the courts from protecting purchaser and drawee but rather that the denial of the required privity was a rationalization of the courts which felt that the equities in favor of a subsequent purchaser or the drawee were not strong enough to set aside the general rule which protects the true owner and the drawer. In this connection it is quite noteworthy that the Washington Supreme Court in *Defiance Lumber Company v. Bank of California*, another spurious payroll check case, used the analogy of the negligent mailing and imposter cases to defeat the drawer's recovery from the defendant drawee-bank thus indirectly protecting the recipients as well.<sup>130</sup>

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have argued that the drawer's negligent mailing was not the proximate cause of the purchaser's loss since the forgery—which could not reasonably have been anticipated—had broken the chain of causation. *Knoxville National Bank v. Clark*, 51 Iowa 264 (1879); *Société Générale v. The Metropolitan Bank*, 27 L. T. R. (N.S.) 849 (C. P. 1873).

128. Among other authorities the court relied upon *Weisberger Company v. Barberton Savings Bank*, 84 Ohio St. 29, 95 N. E. 379 (1911), which involved an action of the drawer against the drawee-bank under similar circumstances.

129. *Robertson v. Coleman*, 141 Mass. 231, 4 N. E. 619 (1886); *Land Title and Trust Company v. Northwestern National Bank*, 196 Pa. 230, 46 Atl. 420 (1900); *Holub-Dusha Company v. Germania Bank*, 164 App. Div. 279, 149 N. Y. Supp. 775 (1914). But *cf.* *Strang v. Westchester County National Bank*, 235 N. Y. 68 (1923); *Cohen v. Lincoln Savings Bank*, 275 N. Y. 399, 10 N. E. (2d) 457 (1937), (1938) 7 *FORDHAM L. REV.* 106; (1938) 38 *COL. L. REV.* 171. *Contra*: *Toleman v. American National Bank*, 22 R. I. 462, 48 Atl. 480 (1901). No exhaustive discussion of the imposter cases and the distinctions made is here intended. See (1938) *U. OF PA. L. REV.* 526, 530; (1937) 7 *BROOKLYN L. REV.* 220.

130. 180 Wash. 533, 41 P. (2d) 135 (1935). For collection of cases, see note (1935) 99 A. L. R. 439 *et seq.* *Cf.* *Central National Bank v. National Metropolitan Bank*,



## IV.

After reaching the end of our travel through the labyrinth of the Anglo-American law, we are now better prepared to appreciate the simplicity of the continental law. But is not simplicity the only virtue of its solution, and has not the Anglo-American, particularly the American, law complicated as it may be, merits which are completely lacking in the continental law? The question permits no easy answer.

The main criticisms made by Anglo-American writers are two-fold.<sup>131</sup> The first is that the continental solution restricts the issuance of bills. But this is difficult to prove since no statistical evidence has been brought forward of its delictious effect. The little use made of checks in Germany as compared with the United States seems to indicate, however, that there is considerable truth in the assertion. The danger of loss connected with the mailing of checks has caused a considerable fraction of German debtors to use other and safer payment devices; they prefer to pay by non-negotiable post checks. The other principal objection is that the continental solution probably encourages laxity in bill transactions. This may also be true. The continental law makes it fairly safe to buy a negotiable paper from a stranger while the American law places upon the purchaser the risk of a forged indorsement.

The fact that the English law has followed the continental example to the extent of protecting a bona fide banker-drawee who pays a check or other demand draft bearing a forged indorsement raises the further problem of whether the distinction should be made between the bona fide purchasers who do not deserve protection and bona fide payors, at least if they are acceptors or drawees of checks. It has been argued in favor of such a differentiation that the purchaser may choose the seller of a negotiable paper and may turn down a suspicious offer while the acceptor and drawee-bank have no such choice of payment or non-payment.<sup>132</sup> If the acceptor fails to pay and the indorsements prove genuine, he exposes himself to a law-suit by the holder. If the drawee-bank refuses to pay and the indorsements turn out to be genuine, the bank exposes itself—it is said—to a liability to the drawer for slander of credit.<sup>133</sup> On the other hand, if the drawee or acceptor pay, they do so

31 App. D. C. 391 (1908). That the intent theory is merely the rationalization of a desired result has been recognized in *Cohen v. Lincoln Savings Bank*, 275 N. Y. 399 at 407, 10 N. E. (2d) 457 at 461 (1937).

131. Chalmers in LEAGUE OF NATIONS, UNIFICATION OF LAWS RELATING TO BILLS OF EXCHANGE AND PROMISSORY NOTES 103.

132. This has been done in the Continental literature. See KESSLER, WECHSELGESETZ (1933) 79, 80; KESSLER, SCHECKGESETZ (1934) 105 *et seq.* The GENEVA BILLS OF EXCHANGE ACT differentiates in favor of the bona fide payor, Art. 16(2); 40(3).

133. DEBATES, CANADIAN HOUSE OF COMMONS (1890) 1077 *et seq.*, 2 *id.*, at 4405.

It is of interest that the efforts to incorporate into the Canadian Bills of Exchange Act of 1890 a provision parallel to Section 60 of the English Bills of Exchange Act

at their own risk. This dilemma is a real one, however, only so far as the acceptor is concerned and thus far the wisdom of the Anglo-American law is problematical. But these arguments in favor of protecting the drawee-bank are not convincing. First, there is no authority for the contention that a bank which refuses to honor a check because it suspects a forged indorsement exposes itself to liability for slander of credit. All of the cases establishing such a liability concern the entirely different situation where a drawee-bank refuses to honor checks either wilfully or negligently because it mistakenly believes that the drawer has insufficient funds with the bank. Secondly, since most banks pay a check over the counter only after the recipient has given adequate identification of himself, the remedy over against the recipient is not an empty right. Furthermore, the majority of checks are presented through clearing houses with a guarantee of prior indorsements which enables the drawee-bank to make a safe payment. Finally, we have seen that in many cases it is not the drawee-bank which suffers the loss resulting from a forged indorsement, for the drawee-bank has a remedy over against the recipient. Thus the burden ultimately falls upon the person who acquires from the forger, very often the bank which cashes for the forger or his accomplice.

Still a stronger point to be made in favor of the American solution is the fact that it has had the effect of compelling the American banks to carry insurance against forged indorsements. It would seem to be easier for the bank than it is for an individual drawer or holder of negotiable paper to carry such insurance and to distribute the expense among all its customers. From an economic point of view, the American solution is therefore sounder in principle than the continental law. But the rigidity of the American law becomes problematical in cases where employees of large business concerns have committed forgeries which could have been prevented by a proper supervision and which were discovered so late that

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have failed. As a result of the opposition, the original counterpart to Section 60 of the Bills of Exchange Act was dropped and the sole modification made in the existing law was that the drawer of a check forfeits his rights to have the drawee-bank recredit his account if he fails to inform the drawee-bank in writing of a discovered forgery within one year after he has acquired notice. Canadian Bills of Exchange Act, § 49(1) (b). As to the situation in Australia and South Africa, both of which have sections identical with Section 60 of the Bills of Exchange Act, see BYLES ON BILLS (19th ed. 1931).

In the United States, judging by the answers to a questionnaire sent by Professor Steffen, there is "scarcely any support whatever, even among the bankers, for the English rule." Turner, *A Factual Analysis of Certain Proposed Amendments to the Negotiable Instruments Law* (1929) 38 YALE L. J. 1047, at 1051. The apathy of the banks is probably due to the fact that they are involved as often in the role of drawee as they are in that of recipient.

they were no longer covered by the forgery insurance.<sup>134</sup> There is no reason why a business concern should not be compelled to insure itself against such a loss. Furthermore, the wisdom of the Anglo-American solution is also doubtful in cases where the purchaser who has to suffer is not a bank which can carry insurance but an individual purchaser who innocently cashes a forged negotiable instrument. In such a case it would be more equitable to distribute the loss on a basis of negligence and to let the drawer or true owner who negligently handled the negotiable instrument bear the forgery loss rather than the non-negligent purchaser. It is to be hoped that the *Defiance Lumber* case foreshadows a trend in this direction.<sup>135</sup>

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134. *Ericson Co. v. Iowa National Bank*, 211 Iowa 495, 230 N.W. 342 (1931).

135. 180 Wash. 533, 41 P. (2d) 135 (1935), discussed *supra*, page 894.